Edict of Government

"Under what has been dubbed the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties."

Chief Justice Roberts
Georgia, et. al., Petitioners v. Public.Resource.Org, Inc.
590 U.S. ___ ,140 S. Ct. 1498, 206 L. Ed. 2d 732

OHIO JURY INSTRUCTIONS

Civil Instructions

OJI-CV 101- CV 713

General, Special Topics

Ohio Judicial Conference

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USER'S GUIDE to *Ohio Jury Instructions* *[Rev. 10/14/17]*

• **What is *Ohio Jury Instructions*?** *Ohio Jury Instructions* ("*OJI*") is a collection of non-binding model instructions prepared by the Ohio Judicial Conference's Ohio Jury Instructions Committee. Although often cited with approval by courts, including the Supreme Court of Ohio, *OJI* is not considered binding. The template instructions set forth in *OJI* are primarily intended for use by judges in instructing juries in the state and federal courts of Ohio when Ohio law is involved in a case. Practitioners can utilize *OJI* to submit requested jury charges.

• **Organization.** Published in both electronic and print form, *OJI* is divided into two volumes, one for civil and one for criminal. The civil volume consists of one book, while the criminal volume consists of two books. Each volume is further divided into ***titles***, with each title indicating a broad category of related content. Each title is then separated into ***chapters*** that focus on a more narrow set of related content. Each chapter contains individually numbered ***instructions*** that set forth specific jury charges on a particular topic.

• **Examples of Titles:**

Title 3: General Civil Trial Instructions

Title 4: Civil Subject Matter Instructions: Tort-Related

Title 5: Civil Subject Matter Instructions: Contract-Related

• **Examples of Chapters within Title 4:**

Chapter CV 401 Negligence

Chapter CV 403 Comparative Negligence

[chapter designations continue until]

Chapter CV 453 Tortious Interference with Economic Relations

• **Examples of Instructions within Chapter CV 453:**

CV 453.01 Tortious interference with business relations

CV 453.03 Tortious interference with contractual relations

CV 453.05 Tortious interference with employment relations

• **Finding an instruction by topic.** Each volume of *OJI* contains a table of contents prepared by the Ohio Jury Instructions Committee and an index prepared by the print publisher. In the criminal volume, instructions are grouped by topics that generally mirror the criminal statutory scheme set forth in the Ohio Revised Code. In the civil volume, instructions are grouped by topics into titles that are generally related by legal concepts or themes. For example, the chapters in Title 5 all deal with contract-related topics. Within titles, narrower topics generally follow broader topics in the same

related area. For example, "Contracts" is the first chapter in Title 5 and is followed by such chapters as the "Uniform Commercial Code" and the "Consumer Sales Practices Act."

• **Headings.** Each numbered instruction in *OJI* has a descriptive title. Within that titled instruction, there are often multiple instructions, or sections, many of which include descriptive titles, as well as possible sub-sections with their own headings.

• **Example of title of civil instruction:**

CV 417.01 Standard of care: physician/surgeon

• **Example of title of civil section heading:**

CV 417.01 Standard of care: physician/surgeon, ¶ 1. INTRODUCTION.

• **Example of title of criminal instruction:**

CR 521.31 Obstructing official business R.C. 2921.31

• **Example of title of criminal section heading:**

CR 521.31 Obstructing official business R.C. 2921.31, ¶ 2. PRIVILEGE.

• **Instruction heading diagram.** The descriptive title of each instruction is comprised of several important pieces of information. A diagram of an example instruction heading and descriptions of the head pieces includes:

CV 315.01 Personal injury: tort actions (claims arising on and after 4/7/05) *[Rev. 1-24-09]*

Volume Description | Section Number | Instruction Title | Effective Date | Revision Date

• **Volume description.** Two letters will indicate whether an instruction is included in the civil (CV) or criminal (CR) volume of *OJI*.

• **Section number.** The first three digits of the section number indicate the chapter in which the instruction is located. The digits following the decimal point indicate where in the chapter the instruction is located. Criminal instructions generally mirror the criminal statutory scheme set forth in the Ohio Revised Code.

• **Instruction title.** Each numbered instruction in *OJI* has a descriptive title.

• **Effective date.** Users should note that there are often multiple versions of an instruction corresponding to select dates of applicability. These multiple versions are arranged chronologically by ***effective date***. For example, amendments to or judicial interpretation of a criminal statute may necessitate different versions of an instruction explaining different elements or definitions. The ***effective date*** of an instruction is indicated in a parenthetical accompanying its title.

• When a **significant substantive change** has occurred, such as a change in the elements of a crime, there will be a separate instruction covering the time period involved, which will result in *multiple instructions* separated by their distinct effective dates.

• **Example:**

CR 503.02 Murder R.C. 2903.02 (offenses committed on and after 9/6/96 but before

6/30/98) and CR 503.02 Murder R.C. 2903.02 (offenses committed on and after 6/30/98) *[Rev. 2/24/07]*

- When a **minor change** has occurred, the change will be reflected *within* the text of *one* instruction, with a parenthetical indication of the effective date of the change.

- **Example:**

CV 451.19 Affirmative defenses, ¶ 4. UNFORSEEABLE USE OF PRODUCT (Common law claims only arising before 4/7/05).

• **Revision date.** More recent instruction titles are followed by an italicized and bracketed indication of when the Ohio Jury Instructions Committee last drafted or revised that instruction. Users are cautioned that instructions can quickly become outdated due to changes in statutes and case law. Additional research to validate whether any given instruction is up to date is recommended.

- **Example:**

CV 453.01 Tortious interference with business relations *[Rev. 2/23/08]*

• **Use of (ADDITIONAL).** Section headings may be accompanied by the parenthetical characterization "ADDITIONAL." The use of "(ADDITIONAL)" means that the trial judge *should* read and submit the instruction to the jury only when it is applicable or required based on the specific circumstances or facts of the case involved.

- **Example:**

CV 517.07 Collateral in possession of secured party R.C. 1309.27 [UCC § 9-207] *[Rev. 2/24/07]*, ¶ 3. FUNGIBLE (ADDITIONAL).

• **Use of (OPTIONAL).** Section headings may be accompanied by the parenthetical characterization "OPTIONAL." "OPTIONAL" instructions may be used to further define or amplify an existing instruction. The use of "(OPTIONAL)" means that the trial judge *may* read and submit the instruction to the jury when it is applicable based on the specific circumstances or facts of the case involved. Inclusion of an "OPTIONAL" instruction is at the discretion of the trial judge.

- **Example:**

CV 417.01 Standards of care: physician/surgeon [*Rev. 3/28/09*], ¶ 7. FREEDOM FROM NEGLIGENCE (OPTIONAL).

• **Sections within instruction.** Each instruction in *OJI* is usually broken into numbered sections, which can be further broken into lettered subsections. Often this will track statutory numbering and lettering. For example, subsections in a criminal instruction may include (A), (B), and (D)—skipping (C) if the statutory (C) does not constitute an offense. Definitional sections always follow the order in which the terms were first used in the body of the preceding instruction.

• **Need to fill in blanks.** Within a section of an instruction, there may be places where a blank exists. Users must fill in the blanks with the applicable information arising from the circumstances and facts of the case involved.

- **Example:**

CV 425.03 Negligence in proprietary functions, ¶ 1(B). IDENTIFYING A PROPRIETARY FUNCTION. The decision whether a particular activity relates to a proprietary function is a matter of law for the court. I instruct you that _____ is a proprietary function (and that _____ is not a proprietary function).

- **Example of actual instruction given to jury:**

The decision whether a particular activity relates to a proprietary function is a matter of law for the court. I instruct you that selling used computers is a proprietary function and that awarding contracts for the construction of roads is not a proprietary function.

- **Parenthetical alternatives.** Within a section of an instruction, there may be two or more possible choices presented as alternative content contained within separate parentheses. Sometimes the alternatives indicate possible choices that will have to be made so that the instruction matches the circumstances and facts of the case involved. Inapplicable choices should never be presented to the jury. At other times, the alternatives will indicate possible choices between content that mean the same thing; the trial judge should select the most clear or most easily understood choice. In written instructions distributed to a jury, the trial judge should delete the use of parentheses and instead simply include only the applicable word or words selected.

- **Example:**

CV 401.07 Foreseeability *[Rev. 1-10-04]*, ¶ 1. GENERAL. In deciding whether (reasonable) (ordinary) care was used, you will consider whether (the defendant) (either party) in question should have foreseen under the circumstances that the likely result of an act or failure to act would cause some (injury) (damage).

- **Example of actual instruction given to jury:**

In deciding whether reasonable care was used, you will consider whether the defendant in question should have foreseen under the circumstances that the likely result of an act or failure to act would cause some injury.

- **Parenthetical language.** Within a suggested instruction, there may be language contained in parentheses that is not an alternative content choice, but is instead content that the trial judge should read and submit to the jury only when it is applicable or required based on the specific circumstances or facts of the case involved. This parenthetical language serves the same function as model instructions contained in sections headings containing the use of "(ADDITIONAL)" as explained above. Because the parenthetical language is often less than a sentence, it has not received its own section heading.

- **Example:** If you find that the state proved beyond a reasonable doubt all the essential elements of the offense of _____, your verdict must be guilty (as to one or more of the defendants, according to your findings).

- **Multiple parentheticals.** Parentheses usually indicate two or more possible choices presented as alternative content. Sometimes, however, multiple parentheticals indicate two or more units of thought that, by virtue of necessary sentence structure, fall as back-to-back parentheticals, not all of which are alternatives to one another. The last parenthetical(s) may require another selection between distinct alternatives or, as shown below, it may require insertion of a distinct unit of thought.

• **Example:**

The defendant caused the death of (*insert name of victim*) as a proximate result of (committing) (attempting to commit) (*insert name of offense of violence*).

• **Italics.** Similar to the use of blanks, when content is placed in italics, a user must supply the specific necessary content.

• **Example:**

CV 453.07 Tortious Interference with expectancy of inheritance *[Rev. 12/5/09]*, ¶ 1. GENERAL. The plaintiff claims that the defendant intentionally interfered with his/her/its expectancy of inheritance from (*insert name of decedent*) and that the plaintiff was damaged as a result.

• **Presentation of alternatives.** Depending upon the circumstances and facts of the case involved, there is often a need to present alternative instructions to a jury. Alternative instructions are separated by "(*or*)." When the trial judge should select only one of a number of possible alternative instructions, italicized language preceding the list of choices directs the judge to "(*Use appropriate alternative*)." When there is a possible need to read and submit more than one alternative to the jury, italicized language preceding the list of choices directs the trial judge to "(*Use appropriate alternative[s]*)."

• **Example:**

CV 433.01 Right of publicity in individual's persona R.C. Chapter 2741 (claims arising on and after 11/22/99) *[Rev. 5/8/10]*, ¶ 4. COMMERCIAL PURPOSE. "Commercial purpose" means the use of or reference to an aspect of an individual's (name) (voice) (signature) (photograph) (image) (likeness) (distinctive appearance)

(*Use appropriate alternative[s]*)

(A) on or in connection with a place, product, merchandise, goods, services, or other commercial activities;

(*or*)

(B) for advertising or soliciting the purchase of products, merchandise, goods, services, or other commercial activities;

(*or*)

(C) for the purpose of promoting travel to a place;

(*or*)

(D) for the purpose of fundraising.

• **Example of actual instruction given to jury:**

"Commercial purpose" means the use of or reference to an aspect of an individual's distinctive appearance for advertising or soliciting the purchase of products, merchandise, goods, services, or other commercial activities.

• **Comments.** *OJI* frequently includes material set out under the heading of a "COMMENT." Comments generally include references to statutory and case law authority that provide the source for the model instruction given. Other content

included as commentary can include explanations by the Ohio Jury Instructions Committee for a model instruction, suggestions for the trial judge, and indications of what by consensus the Committee believes in regard to an instruction. Comments may also contain material explaining the applicability or limitations of an instruction. The research reflected in a comment should not be considered exhaustive and cannot be relied upon as the most current authority on the issue dealt with by the instruction. No material under a "COMMENT" heading should ever be read or submitted to the jury.

• **Use of "Drawn from."** "Drawn from" is used when the text of the instruction follows the language in the cited authority but not verbatim.

• **Example:**

CV 617.03 Invitee; business visitor *[Rev. 10/9/09]*, ¶ 4. OPEN AND OBVIOUS.

COMMENT

Drawn from *Armstrong v. Best Buy Co. Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573; *Simmers v. Bentley Contr. Co,* 64 Ohio St.3d 642, 1992-Ohio-42. The "open and obvious" doctrine remains a viable part of Ohio law. The split among the appellate courts is effectively reconciled by the "attendant circumstances" exception to the doctrine. Both instructions ("open and obvious" and "attendant circumstances") should be given whenever the trial court has decided to instruct on "open and obvious."

In *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, the Court held that, although the open and obvious doctrine can excuse a defendant's breach of a common-law duty of care, it does not override statutory duties because the violation of a statutory duty constitutes negligence per se. In *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, the Court held that the open and obvious doctrine may be asserted as a defense to a claim of liability arising from a violation of the Ohio Basic Building Code because administrative rule violations do not constitute negligence per se.

• **Definitions.** When an instruction uses a term or terms that need to be defined for a jury, a subsequent numbered section or subsection in that instruction provides either the definition or a reference to elsewhere in *OJI* or in the Ohio Revised Code where the definition to be read and submitted to the jury exists.

• **Examples:**

CV 453.07 Tortious interference with expectancy of inheritance, ¶ 6. UNDUE INFLUENCE. "Undue influence" means that which overpowers the will of a person and induces him/her into making a distribution of his/her property that he/she would not have made if left to act freely and according to his/her own plans and desires.

CV 453.07 Tortious interference with expectancy of inheritance, ¶ 7. REASONABLY CERTAIN. OJI-CV 315.01 (offenses committed on and after 4/7/05) § 10.

• **Verdict forms.** *OJI* includes some suggested templates for verdict forms, often set forth at the end of a particular instruction.

• **Interrogatories.** *OJI* sometimes includes model interrogatories. Generally, these are provided when interrogatories are required by statute or case law. Depending upon the facts of the case and the number and identity of the parties, interrogatories may need

to be modified, and judges should thoroughly examine and, if necessary, edit the interrogatories before submitting them to a jury.

• **Language and style.** When pronoun usage depends upon the gender-specific (or neutral) selection of content, *OJI* indicates the possible choices by using "he/she/it" or "his/her/its." The trial judge should select the applicable pronoun and not provide the jury with the multiple pronoun choices. When the appropriate form of an article depends on the selection of content, *OJI* indicates the possible options by using "a/an." The trial judge should select the applicable article and not provide the jury with both article options.

• **Other explanatory material.** Primarily intended for new judges and practitioners, *OJI* includes several sections discussing how to conduct a jury trial, including checklists and sample instructions. This material is set forth at Title 1 and Title 2 of both volumes.

• **Citation within *OJI*.** *OJI* adheres to the *Ohio Manual of Citations*. Where the *Manual* does not provide guidance on citation form, *OJI* then follows *The Bluebook: A Uniform System of Citation*. In *OJI* itself, the Committee cites to *OJI* without using the complete title, *Ohio Jury Instructions*.

• **Examples:**

OJI-CV Chapter 537

OJI-CV 537.17

• **Citation of *OJI*.** In the state courts of Ohio, users should follow the *Ohio Manual of Citations* when citing *OJI*.

• **Example:**

Ohio Jury Instructions, CV Section 537.17 (Rev. Dec. 10, 2011)

OHIO
JURY INSTRUCTIONS

A collection of STANDARD JURY INSTRUCTIONS in civil and criminal cases prepared by the Jury Instructions Committee of the Ohio Judicial Conference.

CIVIL INSTRUCTIONS
GENERAL
SPECIAL TOPICS

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ISBN: 978-1-59345-588-0 (print)
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Library of Congress Cataloging-in-Publication Data
Ohio jury instructions : a collection of standard jury instructions in civil and criminal cases / prepared by the Jury Instructions Committee of the Ohio Judicial Conference.
p. cm.
Includes index.
ISBN 978-1-59345-589-7 (looseleaf binders) 1. Instructions to juries—Ohio—Forms. 2. Instructions to juries—Ohio. I. Ohio Judicial Conference. Jury Instructions Committee.
KFO542.6.A65 O3722
347.771'0758—dc22
2008044665

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(Rel.20S3–12/2020 Pub.4346)

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PREFACE TO OHIO JURY INSTRUCTIONS

This preface introduces a new revised edition of the Ohio Jury Instructions (OJI) reorganized into self-contained civil and criminal volumes. The former Volume 1 "General Instructions" has been eliminated. Applicable general instructions are included in the civil and criminal volumes. There is one civil volume, now organized by general subject matter areas, and one criminal volume; however, there are three binders. The criminal volume is contained in two binders with a separate tab for "Traffic" offenses.

The purpose of the reorganization is to simplify use of OJI by judges and practitioners. Users will no longer have to switch back and forth between the current Volume 1 "General Instructions" and the substantive instructions contained in the remaining volumes. Also, the numbering of all instructions has been revised and simplified. Instructions will now be identified as "CV"(Civil) and "CR"(Criminal). For example, current 4 OJI 503.01, dealing with Aggravated Murder, becomes CR 503.01. A "Correlation Table" is included in each volume containing previous and new section numbers. Both volumes have newly designed, slightly larger loose-leaf binders. The format of individual instructions has not changed.

COMMENT

These first two paragraphs summarize the current reorganization. The balance of the preface provides historical perspective.

Ohio Jury Instructions, commonly called "OJI", was originally the project of Judges Robert L. McBride and Eugene R. McNeill. Its purpose was to present, in the same place in a single set of books, the instructions prepared by judges along with specific examples of such instructions, as well as others that were given in actual cases. The project was a joint effort of the Ohio Judicial Conference and the Ohio Common Pleas Judges Association. It was believed that the Bench and the Bar of Ohio should have the benefit, as well as the economy and convenience, of having all jury instruction material in one place in a single set of books. The jury instruction committee was composed exclusively of judges. In the event that the Committee was unable to develop a "standard" instruction, instructions were provided from individual cases. In theory, this method of combined presentation permitted the Committee to take the time required to develop its "standard" material through provisional drafts and experimental use prior to publication. The consensus among OJI Committee members was that the work of an individual judge would always be helpful until such time as "standard" instructions were developed.

Then, as now, the copyright was owned by the Ohio Judicial Conference, thereby providing for the permanent supervision by the judiciary of the development and publication of the OJI jury instructions.

It was the hope of all parties involved in 1958 that the Ohio Jury Instructions (OJI) would be helpful to the Bench and to the Bar and that the usefulness of the work would improve over the years with the continued cooperation of those interested in the instructional administration of the judicial system in the State of Ohio.

PREFACE TO OHIO JURY INSTRUCTIONS

COMMENT

Drawn from "THE NEW OJI" by Robert L. McBride, Chairman, and Eugene R. McNeill, Vice Chairman.

In 1960, a "*Standard Civil Outline*—Negligence" was released. A companion criminal outline followed in 1962. The responsibility for publication of the instructions was assigned to the Ohio Judicial Conference to relieve the Ohio Common Pleas Judges Association of the printing, sale and distribution of the material.

A standard or pattern jury instruction is a brief, accurate, and complete statement in simple and understandable language covering a single situation, purpose, or point of law. Interest and comprehension by the jury are the first considerations. Technical expressions of decision, partisan language, and references to evidence are eliminated. Exceptional situations are set out separately for use when required by special facts. The Committee recognizes the necessity for direct and simple English. "A court in considering the propriety of any jury instruction must always bear in mind that the purpose of the jury instruction is to clarify the issues and the jury's position in the case. It must be remembered that juries are composed of ordinary people on the street, not trained grammarians, and that fine distinctions in the meaning of words or phrases are not ordinarily recognized by the average layperson. Thus, in considering the propriety of any instruction, the meaning of the words used in the instruction must be thought of in their common meaning to the layperson and not what such words mean to the grammarian or to the trained legal mind." *Bahm v. Pittsburgh & Lake Erie RR. Co.* (1966), 6 Ohio St.2d 192.

COMMENT

Drawn from *Preface to Volume I—1968.*

Three types of instruction appeared in OJI: (1) the "standard" or "pattern" instruction, though not necessarily titled as such; (2) the "approved" instruction, which is an instruction found in a particular case, and (3) the "new" instruction, which is a pattern instruction recommended by the Committee, but which has not yet withstood the test of time. OJI no longer uses these titles.

COMMENT

Drawn from *Preface to Volume I—1983.*

In January 1987, the Ohio Jury Instructions Committee reorganized itself and adopted a plan for the revision of the civil instructions. Under the reorganization, the Committee consisted of an editorial board composed of trial and appellate judges with final approval of all material to be published in OJI, and the writing committees appointed ad hoc to draft new material and revisions. The Board also employed a law professor as an editorial consultant, whose task was to review all drafts, to evaluate their accuracy and scope, and to assure conformity with the Committee's Style Manual. The writing committees were composed of experienced and knowledgeable persons from the judicial, practicing, and academic branches of the profession, under the supervision of a member of the Editorial Board.

It was during this phase in the development of OJI that the use of Comments was broadened to advise OJI users of many matters deemed to be of major significance. During this phase, the

Committee designated as "PROVISIONAL" those instructions published to be of assistance to the Bench and Bar of Ohio, but (of necessity) without specific judicial approval. OJI no long designates instructions as "PROVISIONAL". During this general time period, a software version of OJI became available for various personal computers.

COMMENT

Drawn from *"Preface to Ohio Jury Instructions—1993."*

In the words of former Chair Robert B. Ford, "ever shorter, ever plainer, ever fairer, this is the mission of OJI." Although it is easy to state the goal, it is difficult to attain it. In Ohio, pattern jury instructions are not "pre-approved" by appellate courts. Therefore, it is sometimes difficult to use "plain English" because the Committee is required to use statutory and case law language in drafting instructions. The law is also evolving, and the ever-increasing number of statutes and cases constantly increases the volume of the Committee's work.

The Committee has divided into Civil and Criminal Subcommittees and developed an informal protocol in order to meet the need for more and more instructions. The Ohio State Bar Association and its jury instructions committee have joined with the Ohio Judicial Conference in the ongoing effort to enhance this product. The combined effort has already generated numerous quality instructions, both civil and criminal. Multiple drafting committees using the talents of both Bench and Bar are now in place to draft and modify instructions. Other such drafting committees will be formed as needed.

Enhanced technology has also found its way into OJI. Most, if not all, of the OJI Committee's members have laptop computers to aid their efforts. Use of projection and internet technology at subcommittee meetings has greatly enhanced the editing process. At present, OJI is published in print and CD versions by LexisNexis and on-line versions by LexisNexis, Westlaw, and Casemaker, thereby maximizing user access.

And so it goes . . . evolving, hopefully improving . . . .

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1.69	OJI-CV 101.69
1.71	OJI-CV 101.71
1.73	OJI-CV 101.73
1.75	OJI-CV 101.75
1.77	OJI-CV 101.77
1.79	OJI-CV 101.79
1.81	OJI-CV 101.81
1.83	OJI-CV 101.83

Previous Instruction Number	New Edition Instruction Number
1.85	OJI-CV 101.85
1.87	OJI-CV 101.87
2.01	OJI-CV 301.01
2.10	OJI-CV 301.03
2.20	OJI-CV 301.05
2.21	OJI-CV 301.07
2.25	OJI-CV 309.13
2.50	OJI-CV 309.15
2.51	OJI-CV 309.17
2.52	OJI-CV 301.09
2.53	OJI-CV 301.11
2.60	OJI-CV 309.05
2.61	OJI-CV 309.19
2.62	OJI-CV 309.21
2.65	OJI-CV 309.23
2.67	OJI-CV 309.25
3.01	OJI-CV 311.01
3.05	OJI-CV 303.01
3.10	OJI-CV 303.03
3.50	OJI-CV 303.05
3.75	OJI-CV 303.07
5.10	OJI-CV 305.01
5.13	OJI-CV 309.01
5.15	OJI-CV 309.03
5.20	OJI-CV 305.03
5.30	OJI-CV 305.05
5.31	OJI-CV 309.07
5.50	OJI-CV 309.09
5.70	OJI-CV 309.11
5.92	OJI-CV 311.09
7.10	OJI-CV 401.01
7.11	OJI-CV 401.03
7.12	OJI-CV 401.05
7.13	OJI-CV 401.07
7.14	OJI-CV 401.09
7.15	OJI-CV 401.11
7.17	OJI-CV 401.13
7.18	OJI-CV 401.15
7.19	OJI-CV 401.17
7.20	OJI-CV 401.19
7.25	OJI-CV 401.21
7.26	OJI-CV 401.23
7.27	OJI-CV 401.25
7.28	OJI-CV 401.27

Previous Instruction Number	New Edition Instruction Number
7.29	OJI-CV 401.29
7.30	OJI-CV 401.31
7.35	OJI-CV 401.33
7.70	OJI-CV 401.35
7.71	OJI-CV 401.37
7.80	OJI-CV 401.39
7.90	OJI-CV 401.41
9.13 (claims arising on and after 4/9/03)	OJI-CV 403.01 (claims arising on and after 4/9/03)
9.13 (claims arising before 1/5/88)	OJI-CV 403.01 (claims arising before 1/5/88)
9.13 (claims arising on and after 1/5/88 but before 4/9/03)	OJI-CV 403.01 (claims arising on and after 1/5/88 but before 4/9/03)
9.15 (claims arising on and after 4/9/03)	OJI-CV 403.03 (claims arising on and after 4/9/03)
9.15 (claims arising before 1/5/88)	OJI-CV 403.03 (claims arising before 1/5/88)
9.15 (claims arising on and after 1/5/88 but before 4/9/03)	OJI-CV 403.03 (claims arising on and after 1/5/88 but before 4/9/03)
9.17 (claims arising on and after 4/9/03)	OJI-CV 403.05 (claims arising on and after 4/9/03)
9.17 (claims arising on and after 1/5/88 but before 4/9/03)	OJI-CV 403.05 (claims arising on and after 1/5/88 but before 4/9/03)
9.19 (claims arising on and after 4/9/03)	OJI-CV 403.07 (claims arising on and after 4/9/03)
9.19 (claims arising on and after 1/5/88 but before 4/9/03)	OJI-CV 403.07 (claims arising on and after 1/5/88 but before 4/9/03)
9.50	OJI-CV 403.09
9.60	OJI-CV 403.11
9.70	OJI-CV 403.13
11.10	OJI-CV 405.01
11.20	OJI-CV 405.03
11.30	OJI-CV 405.05
13.01	OJI-CV 617.01
13.03	OJI-CV 617.03
13.05	OJI-CV 617.05
13.07	OJI-CV 617.07
13.09	OJI-CV 617.09
13.11	OJI-CV 617.11
13.13	OJI-CV 617.13
13.15	OJI-CV 617.15
13.17	OJI-CV 617.17
13.19	OJI-CV 617.19
13.21	OJI-CV 617.21
15.10	OJI-CV 423.01

Previous Instruction Number	New Edition Instruction Number
15.11	OJI-CV 423.03
15.30	OJI-CV 423.05
15.31	OJI-CV 423.07
15.50	OJI-CV 423.09
15.51	OJI-CV 423.11
15.52	OJI-CV 423.13
15.70	OJI-CV 423.15
17.00	OJI-CV 311.03
17.05	OJI-CV 311.05
17.11	OJI-CV 311.07
17.13	OJI-CV 311.11
17.15	OJI-CV 311.13
17.16	OJI-CV 311.15
17.20	OJI-CV 311.17
17.30	OJI-CV 311.19
17.40	OJI-CV 311.21
17.50	OJI-CV 311.23
17.60	OJI-CV 311.25
17.70	OJI-CV 311.27
17.90	OJI-CV 311.29
21.10	OJI-CV 313.01
21.20	OJI-CV 313.03
21.30	OJI-CV 313.05
23.01 (claims arising before 4/9/03)	OJI-CV 315.01 (claims arising before 4/9/03)
23.01 (claims arising on and after 4/7/05)	OJI-CV 315.01 (claims arising on and after 4/7/05)
23.01 (claims arising on and after 4/9/03 but before 4/7/05)	OJI-CV 315.01 (claims arising on and after 4/9/03 but before 4/7/05)
23.02	OJI-CV 315.03
23.04	OJI-CV 315.05
23.05	OJI-CV 315.07
23.07	OJI-CV 315.09
23.08	OJI-CV 315.11
23.09	OJI-CV 315.13
23.10	OJI-CV 315.15
23.20	OJI-CV 315.17
23.40	OJI-CV 315.19
23.41	OJI-CV 315.21
23.42	OJI-CV 315.23
23.43	OJI-CV 315.25
23.50	OJI-CV 315.27
23.55	OJI-CV 315.29
23.56	OJI-CV 315..31

Previous Instruction Number	New Edition Instruction Number
23.57	OJI-CV 315.33
23.60	OJI-CV 315.35
23.71 (claims arising on and after 1/5/88 but before 4/7/05)	OJI-CV 315.37 (claims arising on and after 1/5/88 but before 4/7/05)
23.71 (claims arising on and after 4/7/05)	OJI-CV 315.37 (claims arising on and after 4/7/05)
23.72	OJI-CV 315.39
23.75	OJI-CV 315.41
23.76	OJI-CV 315.43
23.77	OJI-CV 315.45
23.90	OJI-CV 315.47
23.91	OJI-CV 315.49
23.92	OJI-CV 315.51
23.93	OJI-CV 315.53
25.10	OJI-CV 317.01
25.20	OJI-CV 317.03
25.30	OJI-CV 317.05
25.40	OJI-CV 317.07
27.01	OJI-CV 319.01
27.05	OJI-CV 319.03
27.10	OJI-CV 319.05
27.50	OJI-CV 319.07
200.01	OJI-CV 435.01
200.03	OJI-CV 435.03
200.05	OJI-CV 435.05
217.01	OJI-CV 409.01
217.03	OJI-CV 409.03
217.05	OJI-CV 409.05
217.07	OJI-CV 409.07
219.01	OJI-CV 429.01
219.02	OJI-CV 429.03
219.03	OJI-CV 429.05
219.05	OJI-CV 429.07
219.07	OJI-CV 429.09
219.09	OJI-CV 429.11
225.01	OJI-CV 411.01
225.02	OJI-CV 411.03
225.03	OJI-CV 411.05
225.04	OJI-CV 411.07
225.05	OJI-CV 411.09
225.07	OJI-CV 411.11
225.08	OJI-CV 411.13
225.12	OJI-CV 411.15
225.13	OJI-CV 411.17

Previous Instruction Number	New Edition Instruction Number
225.131	OJI-CV 411.19
225.14	OJI-CV 411.21
225.15	OJI-CV 411.23
225.19	OJI-CV 411.25
225.20	OJI-CV 411.27
225.201	OJI-CV 411.29
225.202	OJI-CV 411.31
225.21	OJI-CV 411.33
225.22	OJI-CV 411.35
225.25	OJI-CV 411.37
225.251	OJI-CV 411.39
225.26	OJI-CV 411.41
225.27	OJI-CV 411.43
225.28	OJI-CV 411.45
225.29	OJI-CV 411.47
225.30	OJI-CV 411.49
225.31	OJI-CV 411.51
225.32	OJI-CV 411.53
225.33	OJI-CV 411.55
225.34	OJI-CV 411.57
225.35	OJI-CV 411.59
225.36	OJI-CV 411.61
225.37	OJI-CV 411.63
225.38	OJI-CV 411.65
225.39	OJI-CV 411.67
225.40	OJI-CV 411.69
225.41	OJI-CV 411.71
225.42	OJI-CV 411.73
225.43	OJI-CV 411.75
225.431	OJI-CV 411.77
225.44	OJI-CV 411.79
225.441	OJI-CV 411.81
225.45	OJI-CV 411.83
225.451	OJI-CV 411.85
225.452	OJI-CV 411.87
225.46	OJI-CV 411.89
225.47	OJI-CV 411.91
225.48	OJI-CV 411.93
225.481	OJI-CV 411.95
225.49	OJI-CV 411.97
225.50	OJI-CV 411.99
225.51	OJI-CV 411.101
225.52	OJI-CV 411.103
225.66	OJI-CV 411.105

Previous Instruction Number	New Edition Instruction Number
227.02	OJI-CV 411.107
227.021	OJI-CV 411.109
227.03	OJI-CV 411.111
229.01	OJI-CV 629.01
229.02	OJI-CV 629.03
239.01	OJI-CV 605.01
239.03	OJI-CV 605.03
239.05	OJI-CV 605.05
239.07	OJI-CV 605.07
239.09	OJI-CV 605.09
245.01	OJI-CV 407.01
245.03	OJI-CV 407.03
245.05	OJI-CV 407.05
245.07	OJI-CV 407.07
245.09	OJI-CV 407.09
245.11	OJI-CV 407.11
245.13	OJI-CV 407.13
245.15	OJI-CV 407.15
245.17	OJI-CV 407.17
245.19	OJI-CV 407.19
245.21	OJI-CV 407.21
245.23	OJI-CV 407.23
247.01	OJI-CV 713.01
252.01	OJI-CV 447.01
253.01	OJI-CV 501.01
253.03	OJI-CV 501.03
253.05	OJI-CV 501.05
253.07	OJI-CV 501.07
253.09	OJI-CV 501.09
253.11	OJI-CV 501.11
253.13	OJI-CV 501.13
253.15	OJI-CV 501.15
253.17	OJI-CV 501.17
253.19	OJI-CV 501.19
253.21	OJI-CV 501.21
253.23	OJI-CV 501.23
253.24	OJI-CV 501.25
253.25	OJI-CV 501.27
253.26	OJI-CV 501.29
253.27	OJI-CV 501.31
253.29	OJI-CV 501.33
253.31	OJI-CV 501.35
253.33	OJI-CV 501.37
253.35	OJI-CV 501.39

Previous Instruction Number	New Edition Instruction Number
255.01	OJI-CV 521.01
255.03	OJI-CV 521.03
257.01	OJI-CV 625.01
257.03	OJI-CV 625.03
257.05	OJI-CV 625.05
257.07	OJI-CV 625.07
264.01	OJI-CV 431.01
264.03	OJI-CV 431.03
264.05	OJI-CV 431.05
264.07	OJI-CV 431.07
265.01	OJI-CV 419.01
265.02	OJI-CV 419.03
266.01	OJI-CV 533.01
266.03	OJI-CV 533.03
266.05	OJI-CV 533.05
266.07	OJI-CV 533.07
266.09	OJI-CV 533.09
266.11	OJI-CV 533.11
266.15	OJI-CV 533.13
266.17	OJI-CV 533.15
266.19	OJI-CV 533.17
266.21	OJI-CV 533.19
266.23	OJI-CV 533.21
266.25	OJI-CV 533.23
266.27	OJI-CV 533.25
271.01	OJI-CV 453.01
271.03	OJI-CV 453.03
301.01	OJI-CV 609.01
301.03	OJI-CV 609.03
301.05	OJI-CV 609.05
301.07	OJI-CV 609.07
301.09	OJI-CV 609.09
301.11	OJI-CV 609.11
301.13	OJI-CV 609.13
301.15	OJI-CV 609.15
301.17	OJI-CV 609.17
301.19	OJI-CV 609.19
301.21	OJI-CV 609.21
301.23	OJI-CV 609.23
302.01	OJI-CV 537.01
302.03	OJI-CV 453.05
302.05 (claims arising before 4/09/03)	OJI-CV 537.05 (claims arising before 4/09/03)

Previous Instruction Number	New Edition Instruction Number
302.05 (claims arising on and after 4/7/05)	OJI-CV 537.05 (claims arising on and after 4/7/05)
302.05 (claims arising on and after 4/9/03 but before 4/7/05)	OJI-CV 537.05 (claims arising on and after 4/9/03 but before 4/7/05)
302.07	OJI-CV 537.07
302.09	OJI-CV 537.09
302.11	OJI-CV 537.11
302.13	OJI-CV 537.13
302.15	OJI-CV 537.15
302.17	OJI-CV 537.17
305.01	OJI-CV 437.01
307.01	OJI-CV 449.01
307.03	OJI-CV 449.03
307.05	OJI-CV 449.05
307.07	OJI-CV 449.07
307.09	OJI-CV 449.09
307.11	OJI-CV 449.11
307.13	OJI-CV 449.13
307.15	OJI-CV 449.15
307.17	OJI-CV 449.17
309.01	OJI-CV 441.01
309.03	OJI-CV 441.03
309.05	OJI-CV 441.05
309.07	OJI-CV 441.07
312.01	OJI-CV 425.01
312.03	OJI-CV 425.03
312.05	OJI-CV 425.05
312.07	OJI-CV 425.07
312.09	OJI-CV 425.09
312.11	OJI-CV 425.11
312.13	OJI-CV 425.13
312.15	OJI-CV 425.15
313.01	OJI-CV 637.01
313.03	OJI-CV 637.03
313.05	OJI-CV 637.05
313.07	OJI-CV 637.07
313.09	OJI-CV 637.09
313.11	OJI-CV 637.11
315.01	OJI-CV 509.01
315.02	OJI-CV 509.03
315.03	OJI-CV 509.05
315.04	OJI-CV 509.07
317.01	OJI-CV 701.01
317.03	OJI-CV 701.03

Previous Instruction Number	New Edition Instruction Number
317.05	OJI-CV 701.05
317.07	OJI-CV 701.07
317.09	OJI-CV 701.09
317.11	OJI-CV 701.11
317.13	OJI-CV 701.13
317.15	OJI-CV 701.15
319.01	OJI-CV 415.01
319.03	OJI-CV 415.03
319.05	OJI-CV 415.05
319.07	OJI-CV 415.07
319.09	OJI-CV 415.09
319.11	OJI-CV 415.11
323.01	OJI-CV 709.01
323.03	OJI-CV 709.03
323.05	OJI-CV 709.05
323.07	OJI-CV 709.07
323.09	OJI-CV 709.09
323.11	OJI-CV 709.11
323.13	OJI-CV 709.13
323.15	OJI-CV 709.15
323.17	OJI-CV 709.17
323.19	OJI-CV 709.19
323.21	OJI-CV 709.21
323.23	OJI-CV 709.23
323.25	OJI-CV 709.25
323.27	OJI-CV 709.27
323.29	OJI-CV 709.29
323.31	OJI-CV 709.31
323.33	OJI-CV 709.33
323.35	OJI-CV 709.35
323.37	OJI-CV 709.37
323.39	OJI-CV 709.39
323.41	OJI-CV 709.41
323.43	OJI-CV 709.43
323.45	OJI-CV 709.45
323.47	OJI-CV 709.47
323.49	OJI-CV 709.49
323.51	OJI-CV 709.51
323.53	OJI-CV 709.53
323.55	OJI-CV 709.55
323.57	OJI-CV 709.57
323.59	OJI-CV 709.59
323.61	OJI-CV 709.61
323.63	OJI-CV 709.63

Previous Instruction Number	New Edition Instruction Number
323.65	OJI-CV 709.65
325.01	OJI-CV 413.01
325.03	OJI-CV 413.03
325.05	OJI-CV 413.05
325.07	OJI-CV 413.07
325.09	OJI-CV 413.09
325.11	OJI-CV 413.11
327.01	OJI-CV 613.01
327.03	OJI-CV 613.03
327.05	OJI-CV 613.05
327.07	OJI-CV 613.07
327.11	OJI-CV 613.09
327.13	OJI-CV 613.11
327.15	OJI-CV 613.13
327.17	OJI-CV 613.15
327.19	OJI-CV 613.17
327.21	OJI-CV 613.19
327.23	OJI-CV 613.21
327.25	OJI-CV 613.23
327.27	OJI-CV 613.25
327.29	OJI-CV 613.27
327.31	OJI-CV 613.29
327.33	OJI-CV 613.31
327.35	OJI-CV 613.33
329.01	OJI-CV 529.01
330.01	OJI-CV 439.01
330.03	OJI-CV 439.03
330.05	OJI-CV 439.05
330.07	OJI-CV 439.07
330.09	OJI-CV 439.09
331.01	OJI-CV 417.01
331.03	OJI-CV 417.03
331.05	OJI-CV 417.05
331.07	OJI-CV 417.07
331.09	OJI-CV 417.09
331.11	OJI-CV 417.11
331.13	OJI-CV 417.13
331.15	OJI-CV 417.15
331.17	OJI-CV 417.17
331.19	OJI-CV 417.19
333.01	OJI-CV 421.01
333.03	OJI-CV 421.03
333.05	OJI-CV 421.05
333.07	REMOVED

Previous Instruction Number	New Edition Instruction Number
345.01	OJI-CV 621.01
345.03	OJI-CV 621.03
345.05	OJI-CV 621.05
345.07	OJI-CV 621.07
345.09	OJI-CV 621.09
345.11	OJI-CV 621.11
345.13	OJI-CV 621.13
348.01	OJI-CV 705.01
348.03(A)	OJI-CV 705.03
348.03(B)	OJI-CV 705.05
348.07	OJI-CV 705.07
348.09	OJI-CV 705.09
348.11	OJI-CV 705.11
348.13	OJI-CV 705.13
348.15	OJI-CV 705.15
349.01	OJI-CV 433.01
349.03	OJI-CV 433.03
349.05	OJI-CV 433.05
349.07	OJI-CV 433.07
349.09	OJI-CV 433.09
349.11	OJI-CV 433.11
349.13	OJI-CV 433.13
351.01	OJI-CV 451.01
351.03	OJI-CV 451.03
351.05	OJI-CV 451.05
351.07	OJI-CV 451.07
351.09	OJI-CV 451.09
351.11	OJI-CV 451.11
351.13	OJI-CV 451.13
351.15	OJI-CV 451.15
351.17	OJI-CV 451.17
351.19	OJI-CV 451.19
351.21	OJI-CV 451.21
351.23	OJI-CV 451.23
354.01	OJI-CV 601.01
354.03	OJI-CV 601.03
354.05	OJI-CV 601.05
354.07	OJI-CV 601.07
354.09	OJI-CV 601.09
355.01	OJI-CV 443.01
356.01	OJI-CV 445.01
356.03	OJI-CV 445.03
356.05	OJI-CV 445.05
356.07	OJI-CV 445.07

Previous Instruction Number	New Edition Instruction Number
356.09	OJI-CV 445.09
356.11	OJI-CV 445.11
356.13	OJI-CV 445.13
356.15	OJI-CV 445.15
356.17	OJI-CV 445.17
356.19	OJI-CV 445.19
356.21	OJI-CV 445.21
356.23	OJI-CV 445.23
356.25	OJI-CV 445.25
359.01	OJI-CV 513.01
359.03	OJI-CV 513.03
359.05	OJI-CV 513.05
359.07	OJI-CV 513.07
359.09	OJI-CV 513.09
362.01	OJI-CV 505.01
362.03	OJI-CV 505.03
362.05	OJI-CV 505.05
362.07	OJI-CV 505.07
362.09	OJI-CV 505.09
362.11	OJI-CV 505.11
362.13	OJI-CV 505.13
362.15	OJI-CV 505.15
362.17	OJI-CV 505.17
362.19	OJI-CV 505.19
362.21	OJI-CV 505.21
362.23	OJI-CV 505.23
362.25	OJI-CV 505.25
362.27	OJI-CV 505.27
362.29	OJI-CV 505.29
362.31	OJI-CV 505.31
362.33	OJI-CV 505.33
362.35	OJI-CV 505.35
362.37	OJI-CV 505.37
362.39	OJI-CV 505.39
362.41	OJI-CV 505.41
362.43	OJI-CV 505.43
362.45	OJI-CV 505.45
362.47	OJI-CV 505.47
362.49	OJI-CV 505.49
362.51	OJI-CV 505.51
362.53	OJI-CV 505.53
363.01	OJI-CV 633.01
363.03	OJI-CV 633.03
363.05	OJI-CV 633.05

Previous Instruction Number	New Edition Instruction Number
363.07	OJI-CV 633.07
363.09	OJI-CV 633.09
363.13	OJI-CV 633.11
365.01	OJI-CV 427.01
365.03	OJI-CV 427.03
365.05	OJI-CV 427.05
365.07	OJI-CV 427.07
365.09	OJI-CV 427.09
365.11	OJI-CV 427.11
365.13	OJI-CV 427.13
365.15	OJI-CV 427.15
365.17	OJI-CV 427.17
365.19	OJI-CV 427.19
369.01	OJI-CV 517.01
369.03	OJI-CV 517.03
369.05	OJI-CV 517.05
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505.01(A) (offenses committed on and after 7/1/96) [Rev. 1-20-07]	OJI-CR 505.01(A) (offenses committed on and after 7/1/96)
505.01(B) (offenses committed before 7/1/96)	OJI-CR 505.01(B) (offenses committed before 7/1/96)
505.01(B) (offenses committed on and after 7/1/96)	OJI-CR 505.01(B) (offenses committed on and after 7/1/96)
505.02 (offenses committed before 7/1/96)	OJI-CR 505.02 (offenses committed before 7/1/96)
505.02 (offenses committed on and after 7/1/96)	OJI-CR 505.02 (offenses committed on and after 7/1/96)
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505.05 (offenses committed before 7/1/96)	OJI-CR 505.05
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505.22 (offenses committed on and after 7/1/96)	OJI-CR 505.22 (offenses committed on and after 7/1/96)
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507.02(A)(1) (offenses committed on and after 7/1/96 but before 3/10/98)	OJI-CR 507.02(A)(1) (offenses committed on and after 7/1/96 but before 3/10/98)
507.02(A)(1) (offenses committed on and after 3/10/98)	OJI-CR 507.02(A)(1) (offenses committed on and after 3/10/98)
507.02(A)(2) (offenses committed before 7/1/96)	OJI-CR 507.02(A)(2) (offenses committed before 7/1/96)
507.02(A)(2) (offenses committed on and after 7/1/96)	OJI-CR 507.02(A)(2) (offenses committed on and after 7/1/96)
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507.03 (offenses committed on and after 7/1/96)	OJI-CR 507.03 (offenses committed on and after 7/1/96)
507.04 (offenses committed before 7/1/96)	OJI-CR 507.04 (offenses committed before 7/1/96)
507.04 (offenses committed on and after 7/1/96)	OJI-CR 507.04 (offenses committed on and after 7/1/96)
507.05 (offenses committed before 7/1/96)	OJI-CR 507.05 (offenses committed before 7/1/96)
507.05 (offenses committed on and after 7/1/96 but before 3/10/98)	OJI-CR 507.05 (offenses committed on and after 7/1/96 but before 3/10/98)
507.05 (offenses committed on and after 3/10/98)	OJI-CR 507.05 (offenses committed on and after 3/10/98)
507.06 (offenses committed before 7/1/96)	OJI-CR 507.06 (offenses committed before 7/1/96)
507.06 (offenses committed on and after 7/1/96)	OJI-CR 507.06 (offenses committed on and after 7/1/96)
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507.07 (offenses committed on and after 3/22/01 but before 5/7/02)	OJI-CR 507.07 (offenses committed on and after 3/22/01 but before 5/7/02)
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507.07 (offenses committed on and after 7/31/03)	OJI-CR 507.07 (offenses committed on and after 7/31/03)

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507.09 (offenses committed before 9/26/05)	OJI-CR 507.09 (offenses committed before 9/26/05)
507.09 (offenses committed on and after 9/26/05)	OJI-CR 507.09 (offenses committed on and after 9/26/05)
507.12(A)(1) (offenses committed before 9/3/96)	OJI-CR 507.12(A)(1) (offenses committed before 9/3/96)
507.12(A)(2) (offenses committed before 9/3/96)	OJI-CR 507.12(A)(2) (offenses committed before 9/3/96)
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507.21 (offenses committed on and after 7/1/96)	OJI-CR 507.21 (offenses committed on and after 7/1/96)
507.22 (offenses committed before 7/1/96)	OJI-CR 507.22 (offenses committed before 7/1/96)
507.22 (offenses committed on and after 7/1/96)	OJI-CR 507.22 (offenses committed on and after 7/1/96)
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507.24	OJI-CR 507.24
507.25 (offenses committed before 7/1/96)	OJI-CR 507.25 (offenses committed before 7/1/96)
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507.31 (offenses committed on and after 7/1/96 but before 1/1/04)	OJI-CR 507.31 (offenses committed on and after 7/1/96 but before 1/1/04)
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507.34(A) (offenses committed on and after 7/1/96)	OJI-CR 507.34(A) (offenses committed on and after 7/1/96)
507.34(B) (offenses committed before 7/1/96)	OJI-CR 507.34(B) (offenses committed before 7/1/96)
507.34(B) (offenses committed on and after 7/1/96)	OJI-CR 507.34(B) (offenses committed on and after 7/1/96)
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507.42 (offenses committed on and after 7/1/96)	OJI-CR 507.42 (offenses committed on and after 7/1/96)
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507.321 (offenses committed on and after 7/1/96)	OJI-CR 507.321 (offenses committed on and after 7/1/96)
507.322 (offenses committed before 7/1/96)	OJI-CR 507.322 (offenses committed before 7/1/96)
507.322 (offenses committed on and after 7/1/96)	OJI-CR 507.322 (offenses committed on and after 7/1/96)
507.323 (offenses committed before 7/1/96)	OJI-CR 507.323 (offenses committed before 7/1/96)
507.323 (offenses committed on and after 7/1/96)	OJI-CR 507.323 (offenses committed on and after 7/1/96)
509.02 (offenses committed before 7/1/96)	OJI-CR 509.02 (offenses committed before 7/1/96)
509.02 (offenses committed on and after 7/1/96)	OJI-CR 509.02 (offenses committed on and after 7/1/96)
509.03 (offenses committed before 7/1/96)	OJI-CR 509.03 (offenses committed before 7/1/96)
509.03 (offenses committed on and after 7/1/96)	OJI-CR 509.03 (offenses committed on and after 7/1/96)
509.04 (offenses committed before 7/1/96)	OJI-CR 509.04 (offenses committed before 7/1/96)
509.04 (offenses committed on and after 7/1/96)	OJI-CR 509.04 (offenses committed on and after 7/1/96)
509.05(A) (offenses committed before 7/1/96)	OJI-CR 509.05(A) (offenses committed before 7/1/96)
509.05(A) (offenses committed on and after 7/1/96 but before 9/30/98)	OJI-CR 509.05(A) (offenses committed on and after 7/1/96 but before 9/30/98)
509.05(A) (offenses committed on and after 9/30/98)	OJI-CR 509.05(A) (offenses committed on and after 9/30/98)
509.05(B) (offenses committed before 7/1/96)	OJI-CR 509.05(B) (offenses committed before 7/1/96)
509.05(B) (offenses committed on and after 7/1/96 but before 9/30/98)	OJI-CR 509.05(B) (offenses committed on and after 7/1/96 but before 9/30/98)
509.05(B) (offenses committed on and after 9/30/98)	OJI-CR 509.05(B) (offenses committed on and after 9/30/98)
509.05(C) (offenses committed before 7/1/96)	OJI-CR 509.05(C) (offenses committed before 7/1/96)

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509.05(C) (offenses committed on and after 9/30/98)	OJI-CR 509.05(C) (offenses committed on and after 9/30/98)
509.05(D) (offenses committed before 7/1/96)	OJI-CR 509.05(D) (offenses committed before 7/1/96)
509.05(D) (offenses committed on and after 7/1/96)	OJI-CR 509.05(D) (offenses committed on and after 7/1/96)
509.06 (offenses committed before 7/1/96)	OJI-CR 509.06 (offenses committed before 7/1/96)
509.06 (offenses committed on and after 7/1/96)	OJI-CR 509.06 (offenses committed on and after 7/1/96)
509.07 (offenses committed before 7/1/96)	OJI-CR 509.07 (offenses committed before 7/1/96)
509.07 (offenses committed on and after 7/1/96)	OJI-CR 509.07 (offenses committed on and after 7/1/96)
509.08 (offenses committed before 7/1/96)	OJI-CR 509.08 (offenses committed before 7/1/96)
509.08 (offenses committed on or after 7/1/96)	OJI-CR 509.08 (offenses committed on or after 7/1/96)
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509.23	OJI-CR 509.23
509.24	OJI-CR 509.24
511.01(A)	OJI-CR 511.01(A)
511.01(B)	OJI-CR 511.01(B)
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511.12	OJI-CR 511.12
511.13(A)	OJI-CR 511.13(A)
511.13(B)	OJI-CR 511.13(B)
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511.211	OJI-CR 511.211
513.02 (offenses committed before 7/1/96)	OJI-CR 513.02 (offenses committed before 7/1/96)
513.02 (offenses committed on and after 7/1/96)	OJI-CR 513.02 (offenses committed on and after 7/1/96)
513.03 (offenses committed before 7/1/96)	OJI-CR 513.03 (offenses committed before 7/1/96)
513.03 (offenses committed on and after 7/1/96)	OJI-CR 513.03 (offenses committed on and after 7/1/96)
513.04 (offenses committed before 7/1/96)	OJI-CR 513.04 (offenses committed before 7/1/96)
513.04 (offenses committed on and after 7/1/96)	OJI-CR 513.04 (offenses committed on and after 7/1/96)

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513.11 (offenses committed on and after 7/1/96)	OJI-CR 513.11 (offenses committed on and after 7/1/96)
513.21 (offenses committed before 7/1/96)	OJI-CR 513.21 (offenses committed before 7/1/96)
513.21 (offenses committed on and after 7/1/96)	OJI-CR 513.21 (offenses committed on and after 7/1/96)
513.31(A) (offenses committed before 7/1/96)	OJI-CR 513.31(A) (offenses committed before 7/1/96)
513.31(A) (offenses committed on and after 7/1/96)	OJI-CR 513.31(A)(offenses committed on and after 7/1/96)
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513.32 (offenses committed on and after 7/1/96)	OJI-CR 513.32 (offenses committed on and after 7/1/96)
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513.34 (offenses committed on and after 3/31/97)	OJI-CR 513.34 (offenses committed on and after 3/31/97)
513.40	OJI-CR 513.40
513.41 (offenses committed before 7/1/96)	OJI-CR 513.41 (offenses committed before 7/1/96)
513.42 (offenses committed before 7/1/96)	OJI-CR 513.42 (offenses committed before 7/1/96)
513.42 (offenses committed on and after 7/1/96)	OJI-CR 513.42 (offenses committed on and after 7/1/96)
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513.43 (offenses committed on and after 7/1/96)	OJI-CR 513.43 (offenses committed on and after 7/1/96)
513.44	OJI-CR 513.44
513.45 (offenses committed before 7/1/96)	OJI-CR 513.45 (offenses committed before 7/1/96)
513.45 (offenses committed on and after 7/1/96)	OJI-CR 513.45 (offenses committed on and after 7/1/96)
513.46(A) (offenses committed before 10/29/95)	OJI-CR 513.46(A)(offenses committed before 10/29/95)
513.46(B) (offenses committed before 10/29/95)	OJI-CR 513.46(B) (offenses committed before 10/29/95)
513.46(B) (offenses committed on and after 9/26/96)	OJI-CR 513.46(B) (offenses committed on and after 9/26/96)
513.46(C) (offenses committed on and after 9/26/96)	OJI-CR 513.46(C) (offenses committed on and after 9/26/96)

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513.47 (offenses committed before 7/1/96)	OJI-CR 513.47 (offenses committed before 7/1/96)
513.47 (offenses committed on and after 7/1/96)	OJI-CR 513.47 (offenses committed on and after 7/1/96)
513.48 (offenses committed before 7/1/96)	OJI-CR 513.48 (offenses committed before 7/1/96)
513.48 (offenses committed on and after 7/1/96)	OJI-CR 513.48 (offenses committed on and after 7/1/96)
513.51 (offenses committed before 7/1/96)	OJI-CR 513.51 (offenses committed before 7/1/96)
513.51 (offenses committed on or after 7/1/96)	OJI-CR 513.51 (offenses committed on or after 7/1/96)
513.81 (offenses committed before 7/1/96)	OJI-CR 513.81 (offenses committed before 7/1/96)
513.401	OJI-CR 513.401
515.02	OJI-CR 515.02
515.03	OJI-CR 515.03
515.04	OJI-CR 515.04
515.05	OJI-CR 515.05
515.05(A) (offenses committed before 7/1/96)	OJI-CR 515.05(A) (offenses committed before 7/1/96)
515.05(B) (offenses committed on and after 7/1/96)	OJI-CR 515.05(B) (offenses committed on and after 7/1/96)
515.06 (offenses committed before 7/1/96)	OJI-CR 515.06 (offenses committed before 7/1/96)
515.07	OJI-CR 515.07
515.09	OJI-CR 515.09
515.10(A)	OJI-CR 515.10(A)
515.10(C)	OJI-CR 515.10(C)
515.11	OJI-CR 515.11
515.12 (offenses committed before 7/1/96)	OJI-CR 515.12 (offenses committed before 7/1/96)
517.01	OJI-CR 517.01
517.02(A)	OJI-CR 517.02(A)
517.02(B)	OJI-CR 517.02(B)
517.03	OJI-CR 517.03
517.11(A)	OJI-CR 517.11(A)
517.11(B)	OJI-CR 517.11(B)
517.12	OJI-CR 517.12
517.13	OJI-CR 517.13
517.21(A)	OJI-CR 517.21(A)
517.21(B)	OJI-CR 517.21(B)
517.31	OJI-CR 517.31
517.32	OJI-CR 517.32
517.40	OJI-CR 517.40

Previous Instruction Number	New Edition Instruction Number
517.41	OJI-CR 517.41
517.47	OJI-CR 517.47
519.01	OJI-CR 519.01
519.12(A)	OJI-CR 519.12(A)
519.12(B)	OJI-CR 519.12(B)
519.13(A)	OJI-CR 519.13(A)
519.13(B)	OJI-CR 519.13(B)
519.14	OJI-CR 519.14
519.21(A)	OJI-CR 519.21(A)
519.21(B)	OJI-CR 519.21(B)
519.22	OJI-CR 519.22
519.23(A)	OJI-CR 519.23(A)
519.23(B)	OJI-CR 519.23(B)
519.24	OJI-CR 519.24
519.24(A)(3) (offenses committed on and after 1/1/02)	OJI-CR 519.24(A)(3) (offenses committed on and after 1/1/02)
519.25	OJI-CR 519.25
519.27	OJI-CR 519.27
519.231	OJI-CR 519.231
521.02	OJI-CR 521.02
521.03 (offenses committed before 9/3/96)	OJI-CR 521.03 (offenses committed before 9/3/96)
521.03 (offenses committed on and after 9/3/96 and before 11/6/96)	OJI-CR 521.03 (offenses committed on and after 9/3/96 and before 11/6/96)
521.03 (offenses committed on and after 11/6/96)	OJI-CR 521.03 (offenses committed on and after 11/6/96)
521.04 (offenses committed before 9/3/96)	OJI-CR 521.04 (offenses committed before 9/3/96)
521.04 (offenses committed on and after 9/3/96)	OJI-CR 521.04 (offenses committed on and after 9/3/96)
521.05	OJI-CR 521.05
521.11	OJI-CR 521.11
521.12	OJI-CR 521.12
521.13 (offenses committed before 7/1/96)	OJI-CR 521.13 (offenses committed before 7/1/96)
521.13 (offenses committed on and after 7/1/96 and before 10/1/97)	OJI-CR 521.13 (offenses committed on and after 7/1/96 and before 10/1/97)
521.13 (offenses committed on and after 10/1/97)	OJI-CR 521.13 (offenses committed on and after 10/1/97)
521.14	OJI-CR 521.14
521.21	OJI-CR 521.21
521.22(A)	OJI-CR 521.22(A)
521.22(B)	OJI-CR 521.22(B)
521.22(C)	OJI-CR 521.22(C)

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521.22(D) (offenses committed before 3/18/97)	OJI-CR 521.22(D) (offenses committed before 3/18/97)
521.22(D) (offenses committed on and after 3/18/97)	OJI-CR 521.22(D) (offenses committed on and after 3/18/97)
521.22(E)	OJI-CR 521.22(E)
521.24	OJI-CR 521.24
521.31	OJI-CR 521.31
521.32 (offenses committed before 7/1/96)	OJI-CR 521.32 (offenses committed before 7/1/96)
521.32 (offenses committed on and after 7/1/96 and before 12/31/97)	OJI-CR 521.32 (offenses committed on and after 7/1/96 and before 12/31/97)
521.32 (offenses committed on and after 12/31/97)	OJI-CR 521.32 (offenses committed on and after 12/31/97)
521.321	OJI-CR 521.321
521.33 (offenses committed before 7/1/96)	OJI-CR 521.33 (offenses committed before 7/1/96)
521.33 (offenses committed on and after 7/1/96 but before 9/16/97)	OJI-CR 521.33 (offenses committed on and after 7/1/96 but before 9/16/97)
521.33 (offenses committed on and after 9/16/97)	OJI-CR 521.33 (offenses committed on and after 9/16/97)
521.34(A)(1)	OJI-CR 521.34(A)(1)
521.34(A)(2) (offense committed by sexually violent predator on and after 1/1/97)	OJI-CR 521.34(A)(2) (offense committed by sexually violent predator on and after 1/1/97)
521.35(A)	OJI-CR 521.35(A)
521.35(B)	OJI-CR 521.35(B)
521.36	OJI-CR 521.36
521.38	OJI-CR 521.38 (offenses committed on and after 6/11/97 but before 4/4/07) OJI-CR 521.38 (offenses committed on and after 4/4/07)
521.41	OJI-CR 521.41
521.42	OJI-CR 521.42
521.43(A)	OJI-CR 521.43(A)
521.43(B)	OJI-CR 521.43(B)
521.43(C)	OJI-CR 521.43(C)
521.44(A)	OJI-CR 521.44(A)
521.44(B)	OJI-CR 521.44(B)
521.44(C)	OJI-CR 521.44(C)
521.44(D)	OJI-CR 521.44(D)
521.44(E)	OJI-CR 521.44(E)
521.45	OJI-CR 521.45
521.51(B)	OJI-CR 521.51(B)
521.51(C)	OJI-CR 521.51(C)
521.51(D)	OJI-CR 521.51(D)
521.51(E)	OJI-CR 521.51(E)

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521.52	OJI-CR 521.52
521.331	OJI-CR 521.331
523.01 (offenses committed before 7/1/96)	OJI-CR 523.01 (offenses committed before 7/1/96)
523.01 (offenses committed on and after 7/1/96)	OJI-CR 523.01 (offenses committed on and after 7/1/96)
523.02 (offenses committed before 7/1/96)	OJI-CR 523.02 (offenses committed before 7/1/96)
523.02 (offenses committed on and after 7/1/96)	OJI-CR 523.02 (offenses committed on and after 7/1/96)
523.03 (offenses committed before 7/1/96)	OJI-CR 523.03 (offenses committed before 7/1/96)
523.03 (offenses committed on and after 7/1/96)	OJI-CR 523.03 (offenses committed on and after 7/1/96)
523.12	OJI-CR 523.12
523.13 (offenses committed before 7/1/96)	OJI-CR 523.13 (offenses committed before 7/1/96)
523.13(A) (offenses committed on and after 7/1/96)	OJI-CR 523.13(A) (offenses committed on and after 7/1/96)
523.13(B) (offenses committed on and after 7/1/96)	OJI-CR 523.13(B) (offenses committed on and after 7/1/96)
523.15	OJI-CR 523.15
523.16	OJI-CR 523.16
523.17 (offenses committed before 7/1/96)	OJI-CR 523.17 (offenses committed before 7/1/96)
523.17 (offenses committed on and after 7/1/96)	OJI-CR 523.17 (offenses committed on and after 7/1/96)
523.19	OJI-CR 523.19
523.20 (offenses committed before 7/1/96)	OJI-CR 523.20 (offenses committed before 7/1/96)
523.20 (offenses committed on and after 7/1/96)	OJI-CR 523.20 (offenses committed on and after 7/1/96)
523.21 (offenses committed before 11/9/95)	OJI-CR 523.21 (offenses committed before 11/9/95)
523.21 (offenses committed on and after 11/9/95 but before 7/1/96)	OJI-CR 523.21 (offenses committed on and after 11/9/95 but before 7/1/96)
523.21 (offenses committed on and after 7/1/96)	OJI-CR 523.21 (offenses committed on and after 7/1/96)
523.211(B)	OJI-CR 523.211(B)
523.24 (offenses committed before 7/1/96)	OJI-CR 523.24 (offenses committed before 7/1/96)
523.24 (offenses committed on and after 7/1/96)	OJI-CR 523.24 (offenses committed on and after 7/1/96)
523.32(A)(1)	OJI-CR 523.32(A)(1)
523.32(A)(2)	OJI-CR 523.32(A)(2)
523.32(A)(3)	OJI-CR 523.32(A)(3)

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523.42 (offenses committed on and after 1/1/99)	OJI-CR 523.42 (offenses committed on and after 1/1/99)
523.44	OJI-CR 523.44
523.121 (offenses committed before 7/1/96)	OJI-CR 523.121 (offenses committed before 7/1/96)
523.121 (offenses committed on and after 7/1/96)	OJI-CR 523.121 (offenses committed on and after 7/1/96)
523.122 (offenses committed before 7/1/96)	OJI-CR 523.122 (offenses committed before 7/1/96)
523.122 (offenses committed on and after 7/1/96 but before 3/18/97	OJI-CR 523.122 (offenses committed on and after 7/1/96 but before 3/18/97
523.122 (offenses committed on and after 3/18/97 but before 8/6/99)	OJI-CR 523.122 (offenses committed on and after 3/18/97 but before 8/6/99)
523.122 (offenses committed on and after 8/6/99)	OJI-CR 523.122 (offenses committed on and after 8/6/99)
523.123(A)	OJI-CR 523.123(A)
523.123(B)	OJI-CR 523.123(B)
523.131	OJI-CR 523.131
523.161 (offenses committed before 7/1/96)	OJI-CR 523.161 (offenses committed before 7/1/96)
523.161 (offenses committed on and after 7/1/96 but before 8/6/99)	OJI-CR 523.161 (offenses committed on and after 7/1/96 but before 8/6/99)
523.161 (offenses committed on and after 8/6/99)	OJI-CR 523.161 (offenses committed on and after 8/6/99)
525.02 (offenses committed before 7/1/96)	OJI-CR 525.02 (offenses committed before 7/1/96)
525.02 (offenses committed on and after 7/1/96 but before 7/22/98)	OJI-CR 525.02 (offenses committed on and after 7/1/96 but before 7/22/98)
525.02 (offenses committed on and after 7/22/98)	OJI-CR 525.02 (offenses committed on and after 7/22/98)
525.03 (offenses committed before 7/1/96)	OJI-CR 525.03 (offenses committed before 7/1/96)
525.03 (offenses committed on and after 7/1/96 but before 2/13/2001)	OJI-CR 525.03 (offenses committed on and after 7/1/96 but before 2/13/2001)
525.03 (offenses committed on and after 2/13/2001)	OJI-CR 525.03 (offenses committed on and after 2/13/2001)
525.04(offenses committed on and after 7/1/96 but before 8/7/2001)	OJI-CR 525.04 (offenses committed on and after 7/1/96 but before 8/7/2001)
525.04 (offenses committed on and after 7/1/96 but before 8/7/2001)	OJI-CR 525.04 (offenses committed on and after 7/1/96 but before 8/7/2001)
525.041	OJI-CR 525.041
525.05 (offenses committed before 3/23/2000)	OJI-CR 525.05 (offenses committed before 3/23/2000)
525.05 (offenses committed on and after 3/23/2000)	OJI-CR 525.05 (offenses committed on and after 3/23/2000)
525.06	OJI-CR 525.06
525.07	OJI-CR 525.07

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525.09(A) (offenses committed before 7/22/98)	OJI-CR 525.09(A) (offenses committed before 7/22/98)
525.09(A) (offenses committed on and after 7/22/98)	OJI-CR 525.09(A) (offenses committed on and after 7/22/98)
525.09(B)	OJI-CR 525.09(B)
525.11 (offenses committed before 7/1/96)	OJI-CR 525.11(offenses committed before 7/1/96)
525.11 (offenses committed on and after 7/1/96 but before 6/20/97)	OJI-CR 525.11 (offenses committed on and after 7/1/96 but before 6/20/97)
525.11 (offenses committed on and after 6/20/97)	OJI-CR 525.11 (offenses committed on and after 6/20/97)
525.12 (offenses committed before 7/1/96)	OJI-CR 525.12 (offenses committed before 7/1/96)
525.12 (offenses committed on and after 7/1/96)	OJI-CR 525.12 (offenses committed on and after 7/1/96)
525.13 (offenses committed before 7/1/96)	OJI-CR 525.13 (offenses committed before 7/1/96)
525.13 (offenses committed on and after 7/1/96)	OJI-CR 525.13 (offenses committed on and after 7/1/96)
525.14(C) (offenses committed before 7/1/96)	OJI-CR 525.14(C) (offenses committed before 7/1/96)
525.14(C) (offenses committed on and after 7/1/96)	OJI-CR 525.14(C) (offenses committed on and after 7/1/96)
525.22(offenses committed before 7/1/96)	OJI-CR 525.22 (offenses committed before 7/1/96)
525.22(offenses committed on and after 7/1/96)	OJI-CR 525.22(offenses committed on and after 7/1/96)
525.23 (offenses committed before 7/1/96)	OJI-CR 525.23 (offenses committed before 7/1/96)
525.23(offenses committed on and after 7/1/96 but before 7/22/98)	OJI-CR 525.23(offenses committed on and after 7/1/96 but before 7/22/98)
525.23(offenses committed on and after 7/22/98)	OJI-CR 525.23(offenses committed on and after 7/22/98)
525.24	OJI-CR 525.24
525.31(offenses committed before 7/1/96)	OJI-CR 525.31(offenses committed before 7/1/96)
525.31(offenses committed on and after 7/1/96)	OJI-CR 525.31(offenses committed on and after 7/1/96)
525.32 (offenses committed before 7/1/96)	OJI-CR 525.32 (offenses committed before 7/1/96)
525.32(offenses committed on and after 7/1/96 but before 1/1/97)	OJI-CR 525.32(offenses committed on and after 7/1/96 but before 1/1/97)
525.32(offenses committed on and after 1/1/97)	OJI-CR 525.32(offenses committed on and after 1/1/97)
525.33	OJI-CR 525.33
525.36 (offenses committed before 7/1/96)	OJI-CR 525.36 (offenses committed before 7/1/96)

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525.36 (offenses committed on and after 7/1/96)	OJI-CR 525.36 (offenses committed on and after 7/1/96)
525.37(offenses committed before 7/1/96)	OJI-CR 525.37(offenses committed before 7/1/96)
525.37 (offenses committed on and after 7/1/96)	OJI-CR 525.37 (offenses committed on and after 7/1/96)
525.42	OJI-CR 525.42
527.01	OJI-CR 527.01
527.02(B)(1)	OJI-CR 527.02(B)(1)
527.02(B)(2)	OJI-CR 527.02(B)(2)
527.02(B)(3) (offenses committed on and after 3/15/01)	OJI-CR 527.02(B)(3) (offenses committed on and after 3/15/01)
527.02(C)	OJI-CR 527.02(C)
527.03	OJI-CR 527.03
527.11	OJI-CR 527.11
527.12	OJI-CR 527.12
527.13	OJI-CR 527.13
527.21	OJI-CR 527.21
527.24(B)	OJI-CR 527.24(B)
527.24(C)	OJI-CR 527.24(C)
527.27(A) (offenses committed on and after 10/09/01)	OJI-CR 527.27(A) (offenses committed on and after 10/09/01)
527.27(B) (offenses committed on and after 10/09/01)	OJI-CR 527.27(B) (offenses committed on and after 10/09/01)
533.92	OJI-CR 533.92
547.11(A)(1)(offenses committed on and after 1/1/04)	OJI-CR 547.11(A)(1)(offenses committed on and after 1/1/04)
547.11(A)(2)-(6) (offenses committed on and after 1/1/04)	OJI-CR 547.11(A)(2)-(6) (offenses committed on and after 1/1/04)
547.11(B)(offenses committed on and after 1/1/04)	OJI-CR 547.11(B)(offenses committed on and after 1/1/04)
549.01(offenses committed on and after 1/1/04)	OJI-CR 709.01(offenses committed on and after 1/1/04)
549.02	OJI-CR 749.02
549.021	OJI-CR 749.021
549.03	OJI-CR 749.03
549.62(A)	OJI-CR 749.62(A)
549.62(B)	OJI-CR 749.62(B)
549.62(C)	OJI-CR 749.62(C)
549.62(D)	OJI-CR 749.62(D)
550.02 (offenses committed before 7/1/97)	OJI-CR 550.02 (offenses committed before 7/1/97)
550.04 (offenses committed on and after 7/1/97 but before 7/13/030)	OJI-CR 550.04 (offenses committed on and after 7/1/97 but before 7/13/030)
550.04 (offenses committed on and after 7/31/03)	OJI-CR 550.04 (offenses committed on and after 7/31/03)

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550.041 (offenses committed on and after 7/31/04)	OJI-CR 550.041 (offenses committed on and after 7/31/04)
550.05 (offenses committed before 7/1/97)	OJI-CR 550.05 (offenses committed before 7/1/97)
550.05 (offenses committed on and after 7/1/97 but before 7/31/03)	OJI-CR 550.05 (offenses committed on and after 7/1/97 but before 7/31/03)
550.05 (offenses committed on and after 7/31/03 but before 4/29/05)	OJI-CR 550.05 (offenses committed on and after 7/31/03 but before 4/29/05)
550.05 (offenses committed on and after 4/2/9/05)	OJI-CR 550.05 (offenses committed on and after 4/2/9/05)
550.06 (offenses committed on and after 7/1/97 but before 7/31/03)	OJI-CR 550.06 (offenses committed on and after 7/1/97 but before 7/31/03)
550.06 (offenses committed on and after 7/31/03)	OJI-CR 550.06 (offenses committed on and after 7/31/03)
551.01	OJI-CR 551.01
551.03	OJI-CR 551.03
551.05	OJI-CR 551.05
551.07	OJI-CR 551.07
551.09	OJI-CR 551.09
551.11	OJI-CR 551.11
555.03	OJI-CR 559.03
710.11(A)(offenses committed before 1/1/04)	OJI-CR 710.11(A)(offenses committed before 1/1/04)
710.11(A) (offenses committed on and after 1/1/04)	OJI-CR 710.11(A) (offenses committed on and after 1/1/04)
710.11(B)(offenses committed before 1/1/04)	OJI-CR 710.11(B)(offenses committed before 1/1/04)
710.11(B) (offenses committed on and after 1/1/04)	OJI-CR 710.11(B) (offenses committed on and after 1/1/04)
710.12(A)(1)(a)(offenses committed before 1/1/04)	OJI-CR 710.12(A)(1)(a)(offenses committed before 1/1/04)
710.12(A)(1)(a) (offenses committed on and after 6/1/04)	OJI-CR 710.12(A)(1)(a) (offenses committed on and after 6/1/04)
710.12(A)(1)(b) (offenses committed before 1/1/04)	OJI-CR 710.12(A)(1)(b) (offenses committed before 1/1/04)
710.12(A)(1)(b) (offenses committed on and after 1/1/04)	OJI-CR 710.12(A)(1)(b) (offenses committed on and after 1/1/04)
710.12(A)(2) (offenses committed before 1/1/04)	OJI-CR 710.12(A)(2) (offenses committed before 1/1/04)
710.12(A)(2)(offenses committed on and after 1/1/04)	OJI-CR 710.12(A)(2)(offenses committed on and after 1/1/04)
710.16(offenses committed before 1/1/04)	OJI-CR 710.16(offenses committed before 1/1/04)
710.16 (offenses committed before 1/1/04)	OJI-CR 710.16 (offenses committed before 1/1/04)
710.21 (offenses committed before 1/1/04)	OJI-CR 710.21 (offenses committed before 1/1/04)

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710.21(offenses committed on and after 1/1/04)	OJI-CR 710.21(offenses committed on and after 1/1/04)
711.19 (offenses committed before 1/1/04)	OJI-CR 711.19 (offenses committed before 1/1/04)
711.19 (offenses committed on and after 1/1/04 but before 6/1/04)	OJI-CR 711.19 (offenses committed on and after 1/1/04 but before 6/1/04)
711.19(offenses committed on and after 6/1/04)	OJI-CR 711.19(offenses committed on and after 6/1/04)
711.19(A) (offenses committed before 6/30/03)	OJI-CR 711.19(A) (offenses committed before 6/30/03)
711.19(A)(offenses committed on and after 6/30/03 but before 1/1/04)	OJI-CR 711.19(A)(offenses committed on and after 6/30/03 but before 1/1/04)
711.19(A)(offenses committed on and after 1/1/04 but before 6/1/04)	OJI-CR 711.19(A)(offenses committed on and after 1/1/04 but before 6/1/04)
711.19(A)(offenses committed on and after 6/1/04)	OJI-CR 711.19(A)(offenses committed on and after 6/1/04)
711.19(A)(1)(b)-(j) (offenses committed on and after 8/17/06)	711.19(A)(1)(b)-(j) (offenses committed on and after 8/17/06)
711.19(A)(2) (offenses committed on and after 9/23/04)	OJI-CR 711.19(A)(2) (offenses committed on and after 9/23/04)
711.19(B) (offenses committed before 6/30/03)	OJI-CR 711.19(B) (offenses committed before 6/30/03)
711.19(B) (offenses committed on and after 6/30/03 but before 1/1/04)	OJI-CR 711.19(B) (offenses committed on and after 6/30/03 but before 1/1/04)
711.19(B) (offenses committed on and after 1/1/04 but before 6/1/04)	OJI-CR 711.19(B) (offenses committed on and after 1/1/04 but before 6/1/04)
711.19(B)(offenses committed on and after 6/1/04)	OJI-CR 711.19(B)(offenses committed on and after 6/1/04)
711.194	OJI-CR 711.194
711.203 (offenses committed before 1/1/04)	OJI-CR 711.203 (offenses committed before 1/1/04)
711.203 (offenses committed on and after 1/1/04)	OJI-CR 711.203 (offenses committed on and after 1/1/04)

TITLE 1

LAW OF THE INSTRUCTIONS

Chapter CV 101 LAW OF THE INSTRUCTIONS

Chapter CV 101

LAW OF THE INSTRUCTIONS

INSTRUCTIONAL ADMINISTRATION OF JUSTICE

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INSTRUCTIONAL ADMINISTRATION OF JUSTICE

CV 101.01 Instructions defined *[Rev. 12-1-07]*

When jurors enter the courtroom they are not required to know the law. If they do, they are nevertheless required to follow the instructions of the court. By way of the instructions the trial judge informs the jurors why they are present, provides information essential to their selection and service, furnishes such legal guidance as necessary as the trial progresses, and, finally, directs them on the law that governs their deliberations.

Emphasis upon the final instruction is due not only to its significance as a

(Text continued on page 3)

summation of the issues and the law of the case, but also to the historical fact that the judicial role at trial was not clearly defined until the beginning of the nineteenth century. *Sparf v. United States* (1895), 156 U.S. 51. Judges who timidly invited jurors to be judges of the law as well as of the facts were in no position to conduct an orderly trial or to assert the supremacy of the law. *State v. Turner* (1831), Wright 20.

Instructions are as essential to an intelligent and orderly trial as they are to a fair and impartial verdict. Therefore, an instruction is generally defined as information transmitted by the court to the jury. The word instruction includes every direction given to the jury. Such information relates primarily to the law but also includes directions for the convenience of the jury, information about the physical facilities available, and many other necessary and practical items.

CV 101.03 Instruction at every step of the trial *[Rev. 12-1-07]*

Instructing the jury is a continuous responsibility that commences with the impaneling of the jury and ends when jurors are dismissed. Instructions should be viewed with this comprehensive approach at *every step* in the trial. The judge is the spokesman of the law. He/she explains the duties of the jurors, the application of the evidence, as well as many other matters, *all* in addition to the traditional final charge.

The better the jurors understand what is taking place as the trial unfolds, the fairer and more complete their verdict. This comprehensive view of the function of instructions throughout the conduct of the trial should never be neglected. An instruction is not confined strictly to the general charge, but necessarily includes any instructions given by the court for the convenience, assistance, or guidance of the jury.

When requested by a party, an instruction issued from the court becomes the law of the case. *Rosenberry v. Chumney* (1960), 171 Ohio St. 48, 51. The use of preliminary instructions before the evidence is introduced is but one example of the recognition of this responsibility to assist the jury and to remove the mystery surrounding the trial at a timely moment with appropriate information. By advice, explanations, and orders before, during, and after trial, the judge has complete control of the law at every step in the proceedings. This chapter divides the trial into its progressive components and discusses the law of instructions as it relates to each. McBride, The Art of Instructing the Jury (Supp. 1979), Section 3.01.

CV 101.05 The role of the judge *[Rev. 12-1-07]*

As discussed in the preceding section, the judicial function encompasses all aspects of the trial at every step from beginning to end. The word "instruction" applies to every direction given by the court to counsel or to the jury, for either the administration of the proceedings or the announcement of law. The control of substantive and procedural law is the exclusive responsibility of the trial judge.

Because of its nature, the final instructions overshadow all others and are the major consideration, but this should not discourage directions and instructions of law throughout the trial.

Supervision and control over the proceedings is entrusted to the trial judge as an

inherent duty. There is no limit to the number and variety of practical and legal questions that arise. A few may be resolved in chambers, but frequently they arise in the courtroom and must be resolved in the presence of the jury. In the latter situation the only vehicle for control is by way of an instruction. An instruction before or during trial carries with it the weight of the law and is the most effective tool, short of sanctions, in the arsenal of the court.

Every judge experiences the initial probing and testing by counsel to discover the extent to which the court will assert its proper role and exercise its power to establish and maintain control of the trial to ensure an orderly, fair, and impartial proceeding. Any weakness or indecision uncovered will be expanded and pressed for a partisan advantage. This is inevitable under the adversary system. In this situation, a judge who hesitates acts as a referee or umpire and fails to assert supervision and control over the proceedings. Such a judge may progressively experience more, rather than less, improprieties. To avoid this result, there is no limit to the reasonable degree of firmness that may be expressed by the court in directions and instructions to counsel or to the jury.

The role and authority of the officer presiding at the trial rests in the inherent power and discretion of the trial judge to fully and firmly carry out his/her responsibility to control the trial and the law. This exercise of power and discretion may not be reversed except for error of law or upon record of an abuse of discretion. McBride, The Art of Instructing the Jury (Supp. 1979), Sections 2.05, 2.06, 2.07, 2.11, 3A.09; Civ.R. 51; Crim.R. 30, 52.

CV 101.07 Time of delivery *[Rev. 12-1-07]*

Regardless of the time during trial, an instruction should be given promptly when the occasion for its use arises. It cannot be too strongly emphasized that the effectiveness of an instruction, particularly one related to the evidence, is enhanced by prompt delivery. If an instruction is delayed, improper acts or evidence may take root and merge into preliminary impressions and conclusions made by the jurors. The longer a necessary instruction is delayed, the more difficult it is for jurors to segregate the facts and avoid or limit the influence of improper evidence or conduct. If the impropriety has an overriding influence, mere delay in delivery may determine the existence of prejudicial effect.

The use of preliminary instructions--introducing to the jury the nature of the issues--has given rise to two problems that should be mentioned.

First, the most timely and proper instruction may later become inappropriate. This is possible with notice pleading under which the specific issues are developed by the testimony and may change substantially at trial. Ordinarily, a change in the course the evidence will take is uncovered in pretrial discovery; however, such information is not necessarily relayed to the trial judge; or counsel may be surprised by unexpected testimony that requires consideration of new issues. If an inaccurate preliminary instruction was delivered, it must be withdrawn and a correct instruction delivered in its place.

Second, while admittedly useful and helpful to the jury, many preliminary instructions, whether merely cautionary or directed to the issues, must not be omitted from the final instruction at the conclusion of the trial. The final charge must be full and complete, and contain all essentials of an appropriate charge, regardless of instructions that may have preceded it during trial. Corrections in preliminary instructions are appropriate before final arguments.

An example of the importance of timely delivery may be found in evidential instructions to disregard or limit the application of testimony. If delivered immediately, they need not be repeated; however, if omitted and included only in the final instruction, the timing is inappropriate to the impartial position of the court. Belated comment on the evidence may be misconstrued.

Final instructions advise the jury to consider all the evidence in determining the verdict. Without a timely and appropriate instruction to disregard or limit the application of testimony, the court may be telling the jury to consider the impropriety.

Timing of the delivery of an instruction to the occasion for its application is important for an effective message to the jury. McBride, The Art of Instructing the Jury (Supp. 1979), Sections 3A.06, 3.10, 3A.13, 14.03; Civ.R. 51; Crim.R. 30.

CV 101.09 Effective delivery *[Rev. 12-1-07]*

The manner in which instructions are delivered is as important to jurors as the subject. On appeal, only the text appears in the record, but in the courtroom the effectiveness of the oral message may be lost by a dull, listless delivery that fails to convey the concern of the judge that his/her words be understood and followed. Proper delivery requires good diction, inflection, enunciation, and clear, meaningful expression paced to the comprehension of the jury. Given a careless performance, it is not unreasonable that the jury infer that the message was not important.

During trial, the circumstances must be considered and the degree of emphasis increased or decreased as the situation requires. Eloquence in the theatrical sense should be avoided. There is, however, never an excuse for a casual or ritualistic recitation of words if the judge expects counsel and the jury to obey his/her directions. The seriousness of the subject and concern of the court is properly reflected in the manner in which the words are delivered. Inflection, tone of voice, rhetorical pauses, and other speech techniques are appropriate to ensure the result intended and required by law.

The final instructions are the ultimate test of substantial justice and of the total efforts of the court, counsel, and the parties. Clarity, arrangement, and development of the text is the first step; however, no matter how well prepared, success or failure depends upon maintaining the interest and attention of the jurors. Much has been said and written, not all complimentary, about this phase of the performance of judicial responsibilities. For present purposes it is sufficient to suggest that help may be found, not only in the arts of speaking and acting, but also in physical aids that simplify the reading and delivery from the bench in the courtroom. Every suitable technique should be utilized to ensure a complete and effective delivery of the final charge, including a

refreshing degree of brevity. McBride, The Art of Instructing the Jury (Supp. 1979), Section 5.09.

CV 101.11 Tests for effectiveness *[Rev. 12-1-07]*

Those who focus their attention solely upon the final instructions neglect the important fact that every step in the trial is designed to carefully develop the facts, the issues, and the law. From the moment the trial commences, the court, counsel, and the witnesses through opening statements, testimony, and instructions apprise the jury of the problem and how to find the answer. Final instructions represent the climax of these united efforts, and when viewed from a juror's perspective following days or weeks of trial, the final summation is not as confusing as those who have not participated in the trial would believe. The effectiveness of a final instruction cannot be determined by isolated excerpts from the charge any more than the instruction can be separated from every word and act that preceded it. The volume of contemporary law is such that guidance is indispensable, but from the history of trial by jury, the Committee may conclude that the significance of instructions and the importance placed upon them is of a relatively recent origin. This is reflected in history in this country when the position of the judge as the source of the law for the jury was questioned.

The effectiveness of instructions cannot be determined by any hard and fast rule. It must be determined by a complete review of the facts, the law, and the circumstances surrounding the trial. The ultimate test rests in the verdict, and if the trial was fair and impartial and the result does substantial justice between the parties, the conclusion must be that the final instructions were effective.

Guides for testing the effectiveness of instructions during the proceedings, particularly as they relate to evidence or incidents at trial, are more specific because the circumstances surrounding their application are available, not buried in the deliberations of the jury. Factors that influence the effect of instructions include the nature of the impropriety or rule involved, the significance of the subject matter, the timeliness of the delivery of the instructions, the level of alertness and perception of the jury, the weight of all other evidence, the person responsible, the repetition of error, the repetition of similar instructions and other circumstances evident at the trial that may influence the jury. Consideration of one or more of these factors is necessary to determine not only whether an instruction is necessary at trial, but also whether the instruction given was effective under the circumstances. McBride, The Art of Instructing the Jury (Supp. 1979), Sections 3A.13, 5.01–5.10, 10.13, 10.14, 15.01–15.08.

CV 101.13 Record required *[Rev. 12-1-07]*

Without a record, error in instructions is not available for purposes of appeal. It is important that the record demonstrate each request to the court, the circumstances justifying it, the ruling of the judge and the instruction actually delivered. Some requests must by rule be in writing and tendered at the appropriate time. If such formalities are ignored during trial or during deliberations, the absence of a complete

record may foreclose the opportunity to assert error on review. Failures in the record are prevalent during deliberations of the jury, and it is here that the absence of a record may be devastating.

Criminal cases. In criminal matters, Crim.R. 22 provides that all proceedings shall be recorded in serious offense cases; however, such recording is not similarly mandated for petty offenses unless requested by a party. This rule for criminal proceedings is designed to guarantee a complete record for review. Counsel should be alert to the necessity for a record any time steps are taken in the absence of a reporter or recording equipment that is authorized and operating.

Civil cases. There is no comparable rule for civil cases. The reason may be the number and variety of proceedings, some with and some without a jury, and others in which a record must be requested. However, the practice generally presents no problem in jury cases except to require vigilance, particularly of counsel, to ensure that no action that could be appealed is taken without an adequate record.

If no record of the evidence or proceedings was made, a narrative statement under App.R. 9 should be considered.

CV 101.15 An appeal on instructions *[Rev. 12-1-07]*

The Committee is not concerned here with the steps required to initiate an appeal, but rather with the necessity for demonstrating error in relation to instructions. The error asserted must be exemplified by the record. If it is not, review will be denied.

Obtaining a complete record is not always a simple matter. At times, particularly when matters are considered in chambers or at the bench, the record of what took place may be overlooked, and its significance not realized until it is too late.

Requests for law to be included in final instructions are governed by Civ.R. 51 and Crim.R. 30 and are discussed elsewhere.

There are no comparable rules governing requests or instructions at any other time during the trial or during deliberations of the jury. The procedure to be followed is entrusted to the inherent discretion of the court to conduct a fair and impartial trial. However, several standards emerge from the cases and control the delivery of other than final instructions. Any communication by the court to the jury is a part of the proceedings and must be delivered in open court in the presence of counsel and the parties. If the jury is deliberating, reasonable notice is necessary.

Criminal cases. In a criminal case the presence of the accused is a part of his/her constitutional guarantee.

During trial there are many communications from the judge to the jury. Many times, the necessity for an instruction arises spontaneously, often unexpectedly, requiring instant action with little or no opportunity for participation by counsel. In such cases an objection is the only course open to counsel. If, however, counsel desires an instruction before or after certain testimony or other incident, he/she must make his/her request, or the necessity for such an instruction may be considered forfeited or waived.

Here again, a complete record is essential.

As the evidence is introduced the record is usually complete, but in the absence of a request this is not true of bench conferences, discussions in chambers, or other times when the jury is absent. This is particularly important during deliberations when the jury asks questions. This critical moment requires a high degree of caution by the court to ensure that all parties are present, their suggestions are considered, and the record of what transpired is made and preserved.

If a record is overlooked it may be considered waived. If a record is denied, counsel is forced to develop a record of the denial by motion, affidavits, deposition, or a statement of the proceedings under App.R. 9. This is a frustrating course that underscores the importance of a prompt request for a record whenever necessary. McBride, The Art of Instructing the Jury (Supp. 1979), Sections 3.23, 3A.07, 3A.08, 3A.09.

CV 101.17 Error and prejudice *[Rev. 12-1-07]*

The distinction between error and prejudice is as important in instructions as in any other phase of the trial. Error is determined by whether the instruction was correct and appropriate. If there is error, prejudice is determined by the degree of the improper influence upon the jury and upon their verdict. Accepting prejudice as any improper influence, however slight, it is apparent that all error is not necessarily prejudicial. There are mistakes in all trials, many of which are relatively immaterial and may be ignored.

The degrees of prejudice are beyond calculation, varying in each situation. For practical purposes the Committee classifies them generally into three groups.

First, there are mistakes, errors or improprieties without genuine significance that have no prejudicial influence. These harmless errors are usually ignored and efforts to correct them may do more harm than good. A request for an instruction in this situation may be denied.

Second, there are significant errors that are prejudicial and may have an adverse influence upon the verdict, unless an appropriate instruction is promptly delivered by the court to alert the jurors of the danger and to direct them to eliminate such evidence or occurrence from their deliberations. This second classification falls within a marginal area of trial mistakes that may be corrected by an appropriate instruction. In this situation the judge should give an instruction, whether requested or not, and proceed with the trial. This group of mistakes may be identified as *removable error*. Because prejudice is possible, even probable at times, counsel may object and request an instruction. Failure to request may be a tactical decision by counsel to avoid an instruction and may be considered a forfeiture. A wise judge will deliver an instruction even though not requested to do so.

Third, there is *irremovable error*. This includes evidence or circumstances that are prohibited or so direct and damaging that an instruction to withdraw or ignore is useless. The conclusion of irremovable prejudicial effect is one of law. No instruction,

however strong and accurate, can be considered as correcting a violation of fundamental law or eliminating the prejudicial result. Examples of irremovable prejudice may be found in the improper admission of confessions, the introduction of statements of others without the right to cross examine, and the improper use of evidence of prior convictions.

The use of instructions to remove prejudice is an elusive and difficult subject. Different errors appear in varying circumstances, requiring a complete review of the evidence and circumstances at trial. Few cases are alike. Whether an instruction to the jury was effective and removed prejudice is initially a decision to be made by the trial judge. His/Her judgment carries considerable weight because of personal observation. In the final analysis, however, whether the influence of error was removed and rendered harmless rests with the reviewing court, which of necessity must reach its decision exclusively from the record submitted. McBride, The Art of Instructing the Jury (Supp. 1979), Sections 3A.10–3A.13.

CV 101.19 Standard instructions *[Rev. 12-1-07]*

The theory of OJI is simple. Each instruction is a brief, accurate, and complete statement in simple and understandable language covering a single situation, purpose, or point of law. Properly organized and systematically assembled, these instructions make up a complete charge in common situations.

It is significant that OJI is an ongoing, voluntary effort by judges and lawyers. The Committee has no authority that implies approval of the instructions or requires their use. Complete freedom of choice by the trial judge is essential to the orderly and continued development of this phase of instructional administration of justice. Although the instructions have been well received and used continuously for many years, it is necessary to repeat the caution that modification of OJI instructions is essential to respond to variations in each case and to changes in the law. Whether to use a standard instruction, modify it, or draft a more appropriate one is a decision that must be made by the trial judge.

Conversational expressions and appropriate informal comment serve a valuable purpose in sustaining the interest of the jury and in relating standard instructions to particular cases. To these should be added transitional expressions and rhetorical questions. The standard portion in these volumes is designed to be direct and simple, using language in the common parlance of lay people and not what such words mean to the grammarian or trained legal mind. The habits and customs of individual judges suggest a variety of informal and conversational additions that are appropriate for use with standard instructions.

Standardization of language for instructions was discussed by judges in Ohio in the late twenties at state-wide meetings, but nothing materialized until the late fifties. By that time the BAJI project--Basic Approved Jury Instructions--of California was well established, notably by the large contingent of judges in Los Angeles County.

In recent years there has been a ground swell toward guides, patterns, and standards for instructions. Forty states pursue such projects, and nearly all have produced one or

more volumes for use by the trial judges. Each is a restatement of state law, expressed in language suitable for the jury. Each reflects the purpose of providing a simple, brief explanation of a difficult subject. McBride, The Art of Instructing the Jury (Supp. 1979), Chapters 9 and 10.

SELECTING THE JURY

CV 101.21 Selecting the jury *[Rev. 12-1-07]*

Both the civil and the criminal rules recognize the necessity for an initial examination of prospective jurors by the court, followed by further questioning by counsel. In the language of the rules the court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by further inquiry.

The judge should *initiate* the voir dire examination by explaining to the prospective jurors why they were summoned, by identifying the respective parties and their attorneys, by generally referring to the issues or charge against the accused, and by putting to the prospective jurors questions touching their qualifications and their ability to serve as impartial jurors in the trial. This is also the time to anticipate the probable length of trial, the daily schedule, and any interruptions such as for holidays, so that the prospective jurors may consider whether personal obligations would affect their attendance and concentration during trial.

CV 101.23 Common voir dire instructions *[Rev. 12-1-07]*

Instructions are indispensable before the start of the trial. At this stage, prospective jurors are uncomfortable, if not frightened. If the judge is to put them at ease and control the proceedings, some preliminary explanation should be given regarding the schedule, the accommodations for jurors, the nature of the case, and how the jury will be selected. Prospective jurors are entitled to know in advance what is expected of them and why the court and counsel pry into their personal backgrounds.

Common instructions to a new panel of prospective jurors include such topics as how and why they were selected, their contribution to the administration of justice, the probable duration of their service, some explanation of procedure, the purpose of challenges, the necessity for delays and conferences, courtroom decorum, and jurors' conduct in and out of the courtroom. If instructions of law are given, they must come from the court and not from counsel.

The judge has a duty to determine that jurors will be fair and impartial. He/She can avoid some of the delay incident to selecting a jury by asking general questions and by confining counsel to other appropriate avenues of examination.

Before starting the examination, the most effective instructions or orders are those in which the judge outlines for counsel, in the absence of the jury, the extent to which he/she will participate in the examination and the restrictions he/she will enforce if

counsel attempt to discuss or to examine on questions of law or the possible outcome of the case. Lawyers cling to the strategy of winning jurors to their partisan view by abusing the purpose of their participation in the selection process. The trial judge should be alert to prevent the creation of the slightest form of disguised prejudice in the selection of the jury. He/She should apprise counsel of his/her policy of preventing its introduction.

Only the judge is responsible if he/she permits the lawyers to encroach on the law or to inject argumentative or hypothetical questions designed to destroy rather than to ensure the impartiality of the jurors before the start of the trial. At this stage, jurors are not expected to know the law and, to put them at ease, the judge should so advise them.

PRELIMINARY INSTRUCTIONS

CV 101.25 Instructions before trial *[Rev. 12-1-07]*

The rules provide that at the commencement and during the course of the trial, the court may give the jury cautionary and other instructions of law relating to trial procedure, credibility, weight of the evidence, and function of the jury, and may acquaint the jury generally with the nature of the case. Civ.R. 51; Crim.R. 30. The right to give preliminary and trial instructions is inherent in the duty of the court.

Once the jury is sworn, it is necessary that jurors be admonished on all phases of their behavior in and out of the courtroom during the trial. Many items must be brought to their attention if a mistrial or prejudicial conduct is to be avoided, not the least of which is the common, general instruction not to read, view, or listen to the public media. In some cases, it is only fair to advise jurors in advance that they may be questioned by the court from day to day to discover whether they have followed the court's instruction. Prompt delivery of such information prevents unintentional violations. It avoids the effect of prejudicial publicity and is particularly appropriate in high-profile cases.

CV 101.27 Preliminary trial instructions *[Rev. 12-1-07]*

The court may also furnish orientation instructions that will be helpful to the jury in the particular case. These may include the claims of the parties, the burden and weight of the evidence, the concept of credibility, and others. Caution should be used to avoid subjects that may not arise at trial.

Roscoe Pound pointed out the shortcomings of a system that requires jurors to listen to the evidence without a clear understanding of the relevancy of the evidence they are hearing. The practice of giving informative instructions at the start of the trial was encouraged by Judge E. Barrett Prettyman of the United States Court of Appeals for the District of Columbia Circuit in the October 1960 issue of the American Bar Journal, 46 A.B.A. J. 1066:

> "It makes no sense to have a juror listen to days of testimony only then to be told that he/she and his/her conferees are the sole judges of the facts, that

the accused is presumed to be innocent, that the government must prove guilt beyond a reasonable doubt, etc. What manner of mind can go back over a stream of conflicting statements of alleged facts, recall the intonations, the demeanor, or even the existence of the witnesses, and retrospectively fit all these recollections into a pattern of evaluation and judgment given him for the first time after the events; the human mind cannot do so. It is not a magnetized tape from which recorded speech can be repeated at chosen speed and volume. The fact of the matter is that this order of procedures makes much of the trial of a lawsuit mere mumbo jumbo. It sounds all right to the professional technicians who are the judge and the lawyers. It reads all right to the professional technicians who are the court of appeals. But to laymen sitting in the box, restricted to listening, the whole thing is a fog."

Preliminary instructions constitute a neglected area of trial administration and are worthy of serious consideration by every trial judge.

Orientation is important, not only for the purpose of acquainting the jurors with legal procedures, but also to eliminate erroneous information regarding trials that is disseminated by the press, radio, and television. McBride, The Art of Instructing the Jury (Supp. 1979), Section 3.10 and following sections.

CV 101.29 A word of caution *[Rev. 12-1-07]*

Although the use of preliminary instructions is encouraged, the jury must nevertheless be *fully* instructed at the close of the case. The necessity for final instructions that are complete is not excused by preliminary information furnished for the assistance of the jury. In *People v. Lupo* (1953), 305 N.Y. 448, the trial judge omitted mentioning the presumption of innocence that he/she had previously delivered. Counsel reminded the court of this failure, and the judge did repeat the instruction. On review, the court recognized the value of preliminary instructions, but indicated that at the close of the case the jury should be fully instructed on all the law applicable to the case. The judge should not assume that the jury recalls and remembers the instructions given days or weeks earlier in preliminary instructions. *People v. Cardinale* (1970), 316 N.Y.S.2d 369.

Another problem exists where new and different issues arise from the evidence after preliminary instructions have been given. Since the introduction of notice pleading it is not unusual for the testimony to develop additional issues. The final instructions must be consistent with the actual issues and the evidence. If a preliminary instruction was delivered that is inapplicable or inconsistent with the evidence, such instruction must be corrected or withdrawn. In *Britton v. Garrison* (1970), 147 Ind.App. 264, the failure to withdraw an instruction that was no longer applicable was held to be prejudicial error because it permitted the jury to speculate on an issue that was not in the case. No rule is more apparent than that preliminary instructions, however proper initially, should not be considered by the jury during their deliberations unless they are supported by evidence introduced during the trial. In this situation, directions to disregard the inappropriate issue or law should be joined with clear and correct

instructions. It is logical and appropriate to deliver such instructions before closing argument. McBride, The Art of Instructing the Jury (Supp. 1979) Section 3.10.

INSTRUCTIONS DURING TRIAL

CV 101.31 Instructions during trial *[Rev. 12-1-07]*

The trial judge frequently instructs the jury during trial. The right to do so is inherent in the duty to control the trial and the evidence. Civ.R. 51 is designed to recognize existing practices, to encourage trial judges to prepare jurors for their final duties, and to advise jurors of the issues and the law at any time. This policy is so helpful that the civil advisory committee recommended it, and the Ohio Supreme Court added the words "and during the course" of the trial to the committee's draft. Ohio Rules of Civil Procedure: A Symposium (1970), 39 Cincinnati L. Rev. 522.

There is no limit to the number and variety of situations that may develop during trial at which an instruction by the court will be necessary and possibly prejudicial if omitted. Excerpts from general instructions are a reliable source for material required during the trial.

While the trial is in progress, the judge has many duties other than those that are a part of the general charge. Management and supervision of the trial, the participants, and the admissibility of evidence are not within the purpose of this volume. Such duties are worthy of note because they are the first that a new judge experiences. Problems appear so unexpectedly at trial that even the most experienced judge is often taken by surprise and not prepared to deliver the appropriate instruction.

A judge should be fair and firm, but courteous, in the exercise of discretion in the conduct of the trial. There are many customs, personal to each judge, that the attorneys discover only from experience or from common knowledge at the bar. Punctuality, limitations on *voir dire*, and decorum in the courtroom are examples of subjects that vary from judge to judge. Counsel have an obligation to learn and to follow instructions in such areas.

A reprimand is similar to an instruction and may have a significant effect on the outcome of the trial. A reprimand should not be made in the courtroom unless the necessity for its use is immediate or was previously suggested by an order made in the presence of the jury. It is not necessary for the court to instruct counsel twice. Repeated violations influence the jury and bring disrespect upon the system of justice. Repetition of any violation in the courtroom should be stopped summarily the moment it occurs. Sanctions or consideration of a new trial may be delayed, but improper conduct should not be protected by the patience or discretion of the court.

Whether by instruction or otherwise, the trial judge must control the proceedings and maintain an atmosphere conducive to a fair trial. Any situation that tends to avoid or to destroy these conditions must be eliminated from the courtroom and from the minds of the jurors with an instruction that is unmistakably clear and definite. It is

axiomatic that a party who creates the necessity for an order or instruction during trial cannot complain because of his/her own misconduct.

Duty of counsel. If an instruction is appropriate, counsel have a duty to make a specific request. A bare objection is insufficient to require the judge to interrupt the trial for an instruction. Counsel may have a tactical reason for not requesting an instruction. If it is apparent that counsel is inexperienced or that an injustice is being done, the proper step should be taken or advice given in chambers where the court may, and sometimes must, play an advisory role. However, with or without a request by counsel, the right/obligation during trial to instruct the jury on the law rests with the court. McBride, The Art of Instructing the Jury (Supp. 1979), Section 3.23 et seq.

CV 101.33 Evidential instructions *[Rev. 12-1-07]*

Evidential instructions encompass an inexhaustible source of substantive, evidential, and procedural problems that vary with each case. Throughout the trial, counsel will test the discretion and skill of the judge in maintaining the law, impartiality, and discipline in the proceedings. Instructions, used fairly and wisely, are essential tools in the arsenal of the court.

An *evidential instruction* provides, withdraws, or controls the application of the testimony. A *substantive* evidential instruction provides facts that the court may furnish the jury as a matter of law or by agreement of the parties. A *withdrawal* instruction, or an instruction to disregard, removes from the consideration of the jury facts, circumstances, or arguments that the jurors have heard or observed. A *limiting* instruction controls the application of evidence to the purpose or purposes for which it is introduced and requires that such evidence be disregarded as to other purposes or parties. A *conditional* instruction authorizes the jury to determine whether to accept or to reject evidence. The jury may consider such evidence if it determines that a preliminary condition has been established; otherwise, the jury is directed to disregard it. The significance of a conditional instruction was substantially removed by *State v. Perry* (1968), 14 Ohio St.2d 256, which prospectively adopted the orthodox rule by which the trial judge separately, solely, and finally determines the admissibility of the evidence. See McBride, The Art of Instructing the Jury (Supp. 1979), Sections 3A.03 to 3A.09, for a discussion of the types of prejudicial evidence and the effectiveness of evidential instructions.

REQUESTS FOR FINAL INSTRUCTIONS

CV 101.35 Requests for final instructions *[Rev. 12-1-07]*

The Civil Rules abolished the practice under the former statutes that required the court to deliver requested instructions before argument in the language in which they were submitted. The statutory practice was a contest in which each party sought to rhetorically outwit the court, to confuse the jury, and to perfect an appeal, if necessary.

Civil Rule 51 and Criminal Rule 30 provide that a party may submit written

requests, copies of which must be exchanged with opposing counsel, on matters of law to be included in the final instructions of the court. The written requests must be submitted at the close of the evidence or earlier if the court directs. Prior to closing arguments, the court is required to inform counsel of its proposed action on the requests, but the law to be announced and the language in which it is expressed in the general instruction remain exclusively with the trial judge. The court must reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve those instructions for the record.

Civil Rule 51 and Criminal Rule 30 restored to the trial judge complete control over the law and the language of the law furnished the jury. The judge is not required to accept the language of counsel in requested instructions. The judge may instruct on the subject using the judge's own language. The former practice, which permitted both parties as well as the judge to furnish the law in different language, was long criticized as confusing and deceptive and was the source of more litigation and error than any other phase of trial.

The rules do not prohibit the trial judge from orally delivering instructions before argument if, in his/her discretion, he/she considers them necessary. It is proper before argument to advise the jury in a civil case of undisputed and admitted issues. Appropriate instructions before argument are permitted under the inherent power of the court and under Civ.R. 51 and Crim.R. 30; counsel have no mandatory right to such pre-argument instructions. This is also the time to correct, if necessary, instructions given at the commencement of the trial. General instructions follow the closing arguments of counsel.

The existence of standard language provided by Ohio Jury Instructions and the use by counsel of such language in their written requests to the court has reduced the time and confusion incident to requests for inclusion of material in final instructions. Although requests may be recognized by the OJI numbering system, such requests do not comply with the rule that each request be in writing and exchanged within the time required.

It is important that the record reflect the ruling of the court on each proposed request even though the action taken by the court is usually reflected in the language used in the final instructions. The rule requires not only an objection, but also a specific statement of the matter to which counsel objects and the grounds for the objection.

It is a matter of considerable convenience that Civ.R. 51 and Crim.R. 30 on requested instructions are the same.

INTERROGATORIES TO THE JURY

CV 101.37 Special verdicts; advisory jury *[Rev. 12-1-07]*

Civil Rule 49 provides that the general verdict shall be used and abolishes the use

of a special verdict. Upon request, interrogatories may be used with a general verdict in such form as the court approves.

In unreported cases involving workers' compensation, will contest, and appropriation, the use of interrogatories without a general verdict was questioned as a violation of Civ.R 49 which abolished the special verdict. Argument may be found in the statutes[1] to support special submission of issues in the nature of a special verdict; however, because the issues submitted in interrogatories in the above cases resolve determinative questions, it is impossible to find prejudice even though there may be a technical violation of Civ.R. 49. Submission of such special issues is complicated by the use of a general verdict. But see *Schellhouse v. Norfolk & W. Ry. Co.* (1991), 61 Ohio St. 3d 520. Because special submission without a general verdict continues in these cases, an amendment to the rules would relieve the lingering doubt concerning this practice in specified types of cases. The distinction is one of semantics.

In Civ.R. 39 may be found provision for an advisory jury and, with consent of both parties, trial of special issues by the jury. This subsection provides in all actions not triable of right by a jury that, (1) the court upon motion or on its own initiative may try any issue with an advisory jury or, (2) the court, with the consent of both parties, may order a trial of any issue with the jury whose verdict has the same effect as if trial by jury had been a matter of right.[2] This subsection applies only to non-jury cases. With an advisory jury the court is not required to accept the jury's conclusion. However, under the second provision of the subsection, the answer or answers of the jury determine the verdict. The method of submission of special issues under this rule is similar to that of a special verdict. The issues submitted should be determinative and in interrogatory form.

CV 101.39 Interrogatories to the jury *[Rev. 12-1-07]*

Interrogatories for special findings on determinative issues either of fact, or mixed law and fact, are required to be submitted upon request to the jury, along with the general verdict. The request for interrogatories must be made prior to the commencement of argument with written copies submitted at the time to the court and to opposing counsel. Civ.R. 49. The interrogatories shall be submitted to the jury in such form as the court approves. The rule requires the court to inform counsel of its proposed action on the requests prior to final argument.

In the final instructions the court is required to give such explanations or instructions as may be necessary to enable the jury to answer the interrogatories and to render a general verdict. This includes appropriate instructions of law.

If the answers and the general verdict are consistent, a judgment shall be entered. If

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[1] For example, R.C. 2711.03 provides for the submission to the jury of the issue of the right to arbitration.

[2] This permits a jury in non-jury cases if the parties consent and the court agrees. The reference to "any issue" implies the use of a special verdict or interrogatory. A general verdict requires a determination of all issues.

one or more of the answers is inconsistent with the general verdict, either (1) judgment may be entered in accordance with the answers, notwithstanding the general verdict, (2) the court may return the jury for further consideration of its answers and the verdict, or (3) the court may order a new trial. Civ.R. 49.

The staff notes of the civil advisory committee are a valuable help in the use of interrogatories. The rule provides counsel a mandatory right to submit written interrogatories on determinative issues in a civil case. A determinative issue is one that incorporates one of the essential elements of the action or of the defense, the resolution of which controls the verdict and the judgment. Such questions must be directed to the determinative issues in the particular case and may also include mixed questions of law and fact. In the latter situation, the instructions of the court must include such substantive law as may be necessary to enable the jury to reach a determinative conclusion of mixed law and fact. The rule permits the submission of determinative issues; it does not authorize special findings on particular facts not amounting to a determinative issue.

The trial judge has control over the form and language of the interrogatories. Questions need not be submitted by the court in the form or language requested. The court has the discretion to change, modify, and clarify each question to avoid confusion and misunderstanding by the jury.

CV 101.41 Narrative response interrogatories *[Rev. 12-1-07]*

The troublesome problem of an interrogatory requiring a narrative report that amounts to a separate finding of particular facts was answered in *Ragone v. Vitali & Beltrami, Jr., Inc.* (1975), 42 Ohio St.2d 161. Requiring the jury to explain its finding on a determinative issue by stating "in what respects" the defendant was negligent was held to be proper.[3]

Submission of a determinative issue along with a demand for particular facts is permissive. Civil Rule 49 does not provide that the jury be required to segregate and report on particular facts inherent in determinative questions as required in a narrative response interrogatory. The *Ragone* case permits, but does not mandate, the imposition of this duty upon lay people to write a separate finding of facts, a duty which proved to be impossible under the special verdict practice.

Problems are experienced with the narrative response question in all cases involving common-law negligence. The trial judge has discretion to adopt a form of interrogatory that avoids the necessity for a narrative response. No party is entitled as of right to its own choice of form of interrogatory. The limited survival of the narrative response interrogatory, which requires special findings on particular facts in addition to the answer to a determinative issue, perpetuates the disadvantage of the special

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[3] A general verdict is always mandatory in a civil action for damages. Civ.R. 49; *Schellhouse v. Norfolk & W. Ry. Co.* (1991), 61 Ohio St.3d 520. The court may reject proposed interrogatories that are untimely, ambiguous, confusing, redundant or otherwise legally objectionable. *Ramage v. Central Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97.

verdict; it also suggests the use by the court of a more direct and complete form of submission of particular facts whenever the mixed issue of law and fact permits. Unfortunately, the solution is not easy and is at times impossible.

There will always be cases of a failure to use ordinary care in which jurors, like judges and lawyers, find it impossible to state separately all the particular facts and circumstances involved. Imposing this duty to delineate the particular facts is an expansion of the rules beyond the determinative issues and revives the troublesome problems of code pleading and special verdicts.[4]

Requiring the jury to report findings of particular facts that constitute a lack of ordinary care imposes a difficult and unfamiliar obligation. Of necessity, such submission requires a specific outline by the court of disputed particular facts, as distinguished from determinative issues. It also requires additional instructions on the nature of the jury's duty and how it may meet its special assignment by drafting in suitable language a narrative statement of a special finding of particular facts sufficient to support its finding on a determinative issue.

Tests for a narrative response. The narrative response type of interrogatory under Civ. R. 49, and permitted in the *Ragone* case, is not to be tested by the fatal "failure to find rule" formerly applied in Ohio when special verdicts were used. The test for an interrogatory is consistency or inconsistency with the general verdict. A response that is vague or incomplete is not necessarily inconsistent. This distinction is significant because it will save a general verdict when the narrative response is incomplete but not inconsistent. However, this test is not helpful to the trial judge who must determine whether to accept the response, continue deliberations and drafting of a *new* response by the jury, or order a new trial.

CV 101.43 Accepting answers to interrogatories *[Rev. 12-1-07]*

The final options in Civ.R. 49 suggest that in every instance when interrogatories are returned, the court excuse the jury and review with counsel the consistency of the answers to the interrogatories which accompany the general verdict. Caution at this point is imperative to avoid error or a miscarriage of justice. When necessary, a delay in the discharge of the jury, along with additional instructions and further deliberations to eliminate inconsistencies, is the only practical course available.

When an answer to an interrogatory is inconsistent with the general verdict, judgment may be entered but is not required to be entered in accordance with the answer. The rule is not mandatory. The condition of inconsistency is a red flag that

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[4] The perpetuation of the narrative response interrogatory, even on a permissive basis, is an anomaly in the civil rules. The special verdict was abolished because determinative issues are split into law and fact and are stated separately. Requiring a response reciting particular facts provoked the demise not only of special verdicts but code pleading as well. This task may still be imposed upon the jury; jurors are asked to do what the profession found impossible. Unless the trial judge finds a more appropriate form of interrogatory and submits it in lieu of a narrative response request by counsel, the troublesome problem of separately stating particular facts on determinative findings will continue.

indicates either a lack of clarity in the instructions or a general misunderstanding or error by the jury. Whichever it may be, further consideration, additional instructions, and continued deliberation by the jury should be undertaken to remove the inconsistency before the jury is discharged. This is the final opportunity of the trial judge to obtain a clear answer or a perfect composition by the jury and to avoid further litigation, a miscarriage of justice, or a new trial.

A delay is imperative any time a narrative response interrogatory is permitted. It may require more time, additional instructions, and further deliberations for the jurors to write a perfect finding of particular facts and circumstances.

If the response to a narrative question is vague and incomplete, the Committee recommends that the trial judge, by the use of additional instructions, point out the significant, particular, disputed factors in the evidence and outline disputed facts impartially to the jury to require their findings on those facts upon which a lack of ordinary care was found to exist. Anything short of a fair outline of the particular factual possibilities in the evidence leaves the narrative composition by the jury to guesswork and speculation.[5]

The *final option* available to the trial judge in the event of the jury's failure to draft a consistent answer or a special finding of particular facts and circumstances in response to a narrative response interrogatory is to grant a new trial. If the finding is partially consistent but otherwise incomplete, it is not inconsistent. Accordingly, the rule permits the trial judge to accept the answer and to affirm the verdict. However, any reluctance to recognize a possible injustice leads to more litigation based upon the jury's inability to include in its narrative finding particular facts consistent with its finding on a determinative issue.

GENERAL INSTRUCTIONS

CV 101.45 The rules *[Rev. 12-1-07]*

The civil and criminal rules changed the procedure for the delivery of general instructions of the court. As in the past, final instructions are delivered after the arguments of counsel. Requests by counsel for instructions, if approved, are incorporated into the general charge in the language of the court and no longer are delivered either before argument or in writing. The court may but is not required to give instructions before argument.

Absent the application of the plain error rule, a party may not assign as error the

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[5] In view of the conceded inability of the bench and bar to draft the particular facts for code pleadings and special verdicts, the imposition of this same duty upon a group of uninitiated jurors without adequate guidance and instruction from the trial judge will meet with the same failure, frustration and defeat.

The narrative response by the jury in an interrogatory and in an advisory jury under Civ.R. 39 survives as a relic of the common law form of special verdict procedure that is prohibited in Civ.R. 49.

giving of, or the failure to give, any part of a final instruction unless he/she: (1) objects thereto before the jury retires to consider its verdict; (2) states specifically the matter to which he/she objects and (3) states the grounds of his/her objection. The objection is required to be made out of the hearing of the jury.

The changes in the rules relate to procedure and the rights and duties of the participants in relation to final instructions but do not otherwise affect the nature, purpose, or content of final instructions. The procedure in the rules for instructions is the same for civil and criminal cases.

CV 101.47 Definition and function of general instructions *[Rev. 12-1-07]*

A general instruction is a complete statement by the court to the jury at the conclusion of the trial outlining the issues, the law, and the procedure to be used by the jury in arriving at a verdict. This instruction provides for the reviewing court the trial judge's view on the law of the case. However, such review is a secondary purpose; it should never outweigh the primary purpose of telling the jurors, in language they can understand, what they need to know to reach a just verdict.

Civil cases. The trial judge must determine the legal significance of the evidence and decide what, if any, issues should be submitted. By "issues" the Committee means those that may be determinative—that is, those that incorporate an essential element of the action or the defense, the resolution of which controls the verdict and the judgment. Instructions of law are based on such issues, supported by competent evidence, which the jury must resolve. The trial judge must decide that an issue exists before the judge provides any law on the subject. This requires a clear, logical mind to recognize issues as they develop. It requires quick and experienced judgment to express the factual issues with accuracy and precision in a simple outline upon which the law is developed for the general instruction.

To do this properly, the first step is to eliminate irrelevant matters on which there is no evidence, no dispute, or the determination of which has no significance. The disputed issues of fact must be outlined, and the law necessary for each issue associated to the question to which it applies.

In addition to outlining the issues and the law, the general instruction must include an explanation of how to weigh the evidence and determine the disputed facts, how to apply the law to factual conclusions, and how to reach and express a decision in the form of a verdict. This phase of the instruction is advisory in nature and includes cautionary information to avoid pitfalls and improper considerations.

This analysis serves as a practical method of describing the functions of a general instruction. These functions are divided as follows:

(1) outline the *issues* and direct the jury on *issues* that are undisputed, but not determinative of, the general verdict.

(2) outline *undisputed facts*, which do not in themselves constitute an issue and on which there is no conflict in the evidence.

(3) the *disputed issues* must be clearly and fairly outlined so that the jury knows

what it must decide through the process of determining the credibility and the weight of the evidence before applying the law of the case.

(4) explain and associate the *specific law* to the respective issues.

(5) provide *cautionary and general advisory instructions* to assist the jury in the performance of its duties.

(6) furnish suitable forms and concluding instructions so that the jury knows how to reach and *express its verdict.*

This outline provides the blueprint or design for the arrangement and development of the component parts of the general charge. Cautionary and advisory instructions (item 5) are usually delivered first and frequently are a repetition of preliminary information furnished at the commencement of trial. McBride, The Art of Instructing the Jury (Supp. 1979), Section 4.03.

Criminal cases. The organization of a criminal charge is much the same with two important differences: (1) the state's issues are fixed by statute, and (2) undisputed issues must be submitted to the jury.

The issues in a criminal case are outlined in the statute defining the offense. The issues are drawn by the general denial which requires no more than standard precautionary instructions. This uniformity in state issues lends itself to simple standard language, if appropriate alternates are used for each specific case. However, defensive issues may be raised by the evidence. These include self-defense, insanity, intoxication, duress, and a few others. Defensive issues are few, well defined in standard instructions, and present no problem except placing the burden of proof and adjusting the concluding directions for expressing the verdict.

It is a fundamental right of the accused to have all issues, even though undisputed, submitted to the jury. Where the accused offers no evidence contradicting the commission of the offense, such failure does not warrant the omission in the instructions of the elements of the crime charged. *State v. Bridgeman* (1977), 51 Ohio App. 2d 105. There is no such thing as a direction by the court on any issue against an accused.

CV 101.49 Undisputed issues *[Rev. 12-1-07]*

In a civil case the duty to outline the issues includes the obligation to tell the jury whether the condition of the evidence is such as to require a factual decision. If the evidence is not disputed, the judge must say so and instruct the jury on the effect of his/her finding.

In a negligence case the major issues are whether a party's conduct was wrongful and, if so, whether such conduct was a proximate cause of injury. At times, both issues are undisputed. This requires the judge to instruct the jury that, on the issues of negligence and causation, it must accept the finding of the court. Such an instruction relieves the judge of the necessity of giving an instruction of law on those issues.

If the court resolves a *determinative* issue, this ends the case and results in a directed

verdict. However, here we are concerned with a conclusive finding by the court that eliminates an issue but does not determine the verdict.

The right to trial by jury in a civil case does not justify or excuse confusing the jury with issues on which there is no dispute. Separate issues that have been eliminated by the pleadings or by the evidence must be pointed out and removed from the jury's consideration by clear and definite directions.

Most cases have multiple issues. The court must identify all issues and point out whether they are disputed. The judge must unequivocally indicate whether the court or the jury resolves an issue. If the jury must do so, the court must furnish the law. If the court decides an issue, it must advise the jury and furnish no law other than such as it chooses to help the jury understand why it must accept a partial direction by the court.

Issues that are solely for the determination of the judge and claims or defenses that are unsupported by any evidence will not be submitted to the jury in a civil case. It is error to submit issues that are unsupported by evidence. The judge should withdraw from the jury's consideration all issues on which there is no evidence.

A plaintiff may claim several acts of negligence but offer evidence of but one. When this happens, the court must eliminate those issues on which there is no evidence and direct the attention of the jury to the one or more issues that must be resolved. At times, both parties may be conclusively negligent, and the judge must say so, but the issues remain whether the negligence of either or both proximately caused the injury.

The instruction withdrawing an issue must be sufficiently emphatic to adequately apprise the jurors that they must not consider such issue. The danger is that the cumulative effect of pointless evidence may be so great that a simple instruction to disregard is not effective. If this can be determined, a new trial is in order. *Hoffman v. Nickloes* (1967), 14 Ohio Misc. 93.

Before closing arguments commence it is appropriate for the court to remove from the jury's consideration issues that are undisputed or agreed to by the parties. If negligence is undisputed, or if negligence or the amount of damages is stipulated, the narrowing of the issues should be announced by the court prior to argument and repeated in the general instruction. This is helpful to the jury and permits counsel to expand argument on the disputed issues.

As indicated in the preceding section, there is no such thing as a direction on any issue against the accused in a criminal case. Even though the evidence is undisputed, the accused is entitled to a verdict by the jury on all issues. McBride, The Art of Instructing the Jury (Supp. 1979), Section 4.04.

CV 101.51 Undisputed facts *[Rev. 12-1-07]*

Where individual facts, not amounting to a specific issue, are undisputed in a civil case, judges are sometimes reluctant to assist the jury. This reluctance may be due to indifference or to a belief by the judge that he/she might be commenting upon the evidence. The rule on commenting on evidence is limited to disputes that the jury must

resolve. Facts not disputed should be pointed out to emphasize what is denied. Neither party can complain if the court instructs the jury in factual areas that are not controverted.

Undisputed facts may be so obvious that direction is not necessary. In negligence cases the time, place, and operational factors are frequently not disputed. To jurors who have heard these facts over a period of days, it is useless repetition to restate them. In this situation the better practice is to concentrate on the disputed factors. If a recitation of undisputed facts will clarify a question or direct the jury to a genuine issue, the court should indicate such facts and simplify the work of the jury. Such instructions are limited to civil cases. McBride, The Art of Instructing the Jury (Supp. 1979), Section 4.15.

CV 101.53 Disputed issues *[Rev. 12-1-07]*

No purpose of general instructions is more important than the outline of disputed issues. It is imperative *to state and outline separately the disputed issues of fact or of mixed law and fact, as the nature of the case and the evidence may require.* Without this kind of guidance, the proceedings will not result in an intelligent verdict. In a criminal case all issues are considered disputed and must be submitted to the jury.

The factual dispute that makes up each determinative issue or essential element must be understood by the court and expressed to the jury in unmistakably clear language. The instructions must lead the jury to the real issues and to the heart of the factual problem that they must decide. The court's outline should not be couched in the language of the pleadings or the claims conjured up by counsel. Issues are made up by the evidence and if not supported by the evidence should not be submitted to the jury. Today's notice pleading is not a trustworthy guide for the issues in a case.

The final instructions must pinpoint the factual differences that provoked and will determine the outcome of the lawsuit. Selection of the disputed issues from a mass of evidence requires clear, logical decisions, made quickly with mature judgment. This function is the critical point in every trial. It is the turning point in many cases. If there is a mistake here, it is vital. A wrong choice will not justify the best law.

There is no substitute for experience on the trial bench. There are no guides or studies designed to help a judge recognize and define the issues from the raw evidence. It is an art that requires patience, clear reasoning, and good judgment. The judge must absorb the stream of words from the witnesses and come up with a few terse sentences that crystallize the problems.

A new judge will attempt to define the issues and prepare instructions from the pleadings before the trial starts. This is a frustrating experience. The issues shift or become confused by a multitude of facts. The language alleging the issues is partisan. High-sounding and abstract instructions prepared in advance of trial fall on bare rocks. Meaningful instructions on individual issues cannot be prepared until the evidence is presented. Efforts to finalize the language on specific issues and law before trial are usually wasted.

The essential elements of the case will emerge, and weak points will be suggested

in opening statements. During trial a judge may prepare and revise notes as issues are established, assembling the law on each point. This requires preliminary judgments as to what is, and what is not an element in the case. Issues not mentioned in the pleadings may appear, and these must be included. Decisions as to what is at issue remain suspended, to be reconsidered as the testimony continues. The judge's problem is to recognize the issues, not to weigh the facts. Notes are useful only if they relate to issues or law that must be incorporated in the final instructions.

By the time the plaintiff rests, the issues will be sufficiently crystallized to write them in language for the jury and to associate each with the law. The outline of the issues must be expanded and revised at the end of the trial to ensure a full, fair, and accurate statement of the issues raised by both parties. At this time the diagnosis is complete. When disputed issues are identified, it is a simple matter to provide the law that must be submitted to the jury.

The method for submitting issues and presenting the law in relation to each rests in the discretion of the trial judge. Negligence cases offer a variety of methods. These include a general or specific submission of issues as well as a use of rhetorical questions to focus attention to each issue. Under a general submission all issues are presented first, followed by the law applicable to each and a general conclusion based upon the conclusions of the jury. Specific submission exists where an issue and the law relating to it are presented together before proceeding to the next issue. Specific submission of issues is common where the issues are few and distinct, as occurs where a red light, a stop sign, or other simple traffic rule is violated. If, for example, the only issue is whether the defendant entered the intersection on a red light, this question may be asked and the jury advised that, if this occurred, the defendant was negligent.

CV 101.55 Specific law *[Rev. 12-1-07]*

No function of instructional administration has received as much attention and criticism as that portion relating to the specific law. This is due to the practical difficulty of expressing substantive law in the language of the average juror.

The mystery surrounding such instructions is more readily removed if preliminary instructions have been used and the general charge is carefully organized. A clear statement of the issues simplifies the preparation, arrangement, and explanation of the law. When the issues have been carefully outlined, the law falls logically into a related pattern that removes the mystery and provides a reasonable and just solution to each issue. A judge who has a clear grasp of the issues is in a position to give instructions of specific law that perform their logical and legal function of educating the jury.

Simple notes on the issues made during the trial are helpful. Each issue should be submitted along with the specific law that applies to it. Care should be taken that the law is in point and presented in an impartial manner that leaves the jury free to apply it to the appropriate issue, according to its findings on the facts.

The selection of the specific law is a process of research that continues throughout the trial, leaving for the final moment the choices that fit the law to the outline of the issues. If the issues are accurately segregated and the specific law is readily available,

less effort is required to associate the two and assemble the law for the general instruction.

The specific law varies in each case. Certain subjects will reappear with a degree of frequency sufficient to justify the use of patterns or standard guides; however, individual cases develop issues that require modification of the most perfect statement of law.

The specific case may include any one of the many conceivable areas of substantive law. The field of law for the jury is unlimited. Invariably, a similar problem was previously presented in another case by another judge. His/her experience and the results of that trial will suggest possible instructions, if patterns are not available.

The trial judge often finds himself/herself in the position of striving for an unimpeachable instruction at the cost of not being helpful to the jury. Such instructions are given to avoid error and not to enlighten the jury. This approach is unworthy of a trial judge and avoids, rather than encourages, definitive decisions by the reviewing courts. If trial by jury is to be successful, instructions must be delivered for the jury. They should contain everything the jurors need in language they can understand. Instructions should also include any reasonable inquiry the jury might make in reaching its verdict. McBride, The Art of Instructing the Jury (Supp. 1979), Section 4.26.

CV 101.57 Cautionary and advisory instructions *[Rev. 12-1-07]*

In addition to the specific law, which varies in each case, the judge must explain the nature and the process of the deliberative activity of the jury. Such explanations are described as advisory or cautionary instructions; however, this designation does not imply that they are discretionary. They include the *common general instructions* that must be given in every case, such as evidence, credibility, burden of proof, weight of the evidence, and the function and duty of the jury. An unlimited number of discretionary items are helpful and may be given to meet individual problems presented in the trial. Cautions as to prejudice and sympathy are traditionally given.

Judges include in the basic charge a preliminary statement regarding the moral responsibility of the jury to follow the law. This is done by pointing out the separate functions of the court and the jury. Jurors are reminded of their sworn duty to accept the instructions of the court, and to apply such instructions without injecting their personal conception of what the law should be.

Equally fundamental in telling the jury how to go about its work is a definition of the burden of proof and the placement of this burden upon the appropriate party. It logically follows that to determine whether this burden has been met, the jury must be told what evidence is, and how it should be considered and weighed to arrive at a determination on each issue.

The common general and cautionary instructions are usually the same in all cases. They should be delivered early in the general charge unless previously given in preliminary instructions.

CV 101.59 Verdicts and concluding instructions *[Rev. 12-1-07]*

Verdict forms and instructions that accompany them serve a practical purpose of emphasizing the issue. The jury must be told how to reach and express its verdict. It is imperative that jurors understand how to state their conclusion and to do so on a form and in a manner that accurately reflects their judgment on the issues.

The findings of the jury are expressed in the form of a general verdict and, if requested, in interrogatories independent of the verdict. Special verdicts have been abolished.

Criminal cases. In criminal cases the general verdict is used without interrogatories. However, such verdicts may be accompanied by special findings to determine issues such as aggravating circumstances, a prior conviction, or value of property.

In the case of a general verdict the court concludes by summarizing what must be established for the plaintiff to recover and explains what happens if an issue or fact is not established. This type of submission is sometimes described as the *formula method.* By their very nature, "iffy" instructions are complicated, confusing, and cause for reversal if not impeccably correct. Most judges avoid the *formula method* by instructing the jury on the issues and then separately on the law. This method is easier to prepare. Binding instructions that require a verdict for one party or the other, if a long list of conditions are established, or if one of a series of issues is not established, should be avoided, if possible. They are by nature repetitive and at times argumentative.

It is at times necessary to itemize the specific findings of the jury on the elements of damage, consistent with multiple causes of action or separate parties plaintiff. A similar breakdown in the verdict from appears in appropriation cases where an issue of residual damage arises, or where equipment may be considered a fixture.

In closing, the court should read and explain verdict forms. Not to do so encourages not only mistakes but longer deliberations and requests by the jury for further instructions. The final function of providing how-to-do-it instructions relating to the verdict includes the customary cautionary instructions, many of which are discretionary with the court. This includes comments on a fair and just verdict, avoidance of prejudice and sympathy, selection and duty of a foreman, conduct during deliberations, importance of reaching a verdict, use of the quotient method, and other suggestions designed to help the jury to avoid pitfalls or unfortunate experiences in their deliberations.

A compromise or quotient verdict that is reached by a surrender of personal convictions as to amount by some members of the jury is invalid and will be set aside. However, if all the jurors agree upon the amount and accept it as fair and just, it is immaterial that it was reached by averaging the amounts furnished by the witnesses.

When discussing verdicts, care should be used not to imply that the jury *must* return a verdict for the plaintiff or the defendant. This statement, often innocently made, goes beyond telling the jury how many must agree to return a verdict. It implies that the jury

is compelled to agree in the face of reasonable and conscientious disagreement. Any coercive statement that may cause a juror to surrender his/her convictions is improper. The court has considerable discretion in suggesting proper motives and methods for reaching agreement, but this does not include an improper consideration. The statement that the jury must decide for one party or the other is usually no more than an unfortunate choice of words. It carries implications that should be avoided.

Verdict forms. General verdict forms are well established. These consist of findings for either the plaintiff or the defendant and an amount in the event either party is entitled to recover. The forms become progressively more complicated with counterclaims, multiple parties and comparative negligence. The single form of verdict is useful in criminal cases. The jury inserts the words, guilty or not guilty, with respect to each count in the indictment. If there are lesser offenses, the jury inserts the appropriate offense from a list of crimes they may consider. Efforts to reduce the volume of possible verdict forms and to simplify their submission to the jury have met with success.

Interrogatories with the verdict. If interrogatories are submitted with a general verdict, the jurors should be provided with the law necessary for their response, as well as directions for the method to be used in expressing their answer.

CV 101.61 Written instructions *[Rev. 8/6/14]*

Civ. R. 51 and Crim. R. 30 provide: "The court shall reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve those instructions for the record."

COMMENT

The Committee believes that the best practice is for the trial judge to provide each juror with an individual, written copy of the final instructions at the time of the oral delivery of the instructions so that the jurors can follow along while the judge reads the instructions. This more comprehensive practice covers additional styles of learning to assist auditory, visual, and tactile learners in understanding the instructions. The recommendation applies to final instructions delivered at each phase of any trial when the trial is divided into multiple phases.

CV 101.63 Objections and requests after general instruction *[Rev. 12-1-07]*

After the general instruction has been delivered, the judge may again be called upon to instruct the jury. The obligation is imposed upon counsel to state specifically any objections to the general charge before the jury retires to deliberate; otherwise, error may not be assigned to the giving or failure to give an instruction. This rule is applicable to civil and criminal cases.

A party may not assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating

specifically the matter to which he/she objects and the grounds for his/her objection. Opportunity shall be given to make the objection out of the hearing of the jury. Civ.R. 51 and Crim.R. 30.

This rule has been firmly and consistently enforced by the reviewing courts. The only exception arises under the plain error rule where elements of the crime have been omitted and defendant's right to a fair trial has been denied. *State v. Bridgeman* (1977), 51 Ohio App.2d 105; *State v. Gideons* (1977), 52 Ohio App.2d 70. The supreme court indicated that notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution under exceptional circumstances and only to prevent a miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91. The waiver rule applies as well in civil cases except where an instruction not objected to is so erroneous as to constitute fundamental error that seriously affects the basic fairness, integrity or public reputation of the judicial process. *Yungwirth v. McAvoy* (1972), 32 Ohio St.2d 285. Where a timely and proper request is denied, a failure to object at the close of the general instruction does not constitute a waiver of the earlier error. *Presley v. Norwood* (1973), 36 Ohio St.2d 29.

A clear distinction is made between *special requests* to instruct on the law, which must be made "at the close of the evidence or at such earlier time during trial as the court reasonably directs," and *objections* to the giving or failing to give an instruction which must be made before the jury retires. New or additional requests may not be made at the conclusion of the general charge. The purpose of the latter provision is to call specific error to the attention of the trial judge who may correct the mistake and avoid the error by delivering additional instructions, if necessary, before the jury retires.

Prior to the adoption of the rules, many judges inquired at the end of the general charge whether counsel desired anything further. Under the rules such an inquiry by the court is a formal recognition of the duty of counsel. Absent plain error a negative response to this inquiry is a waiver of objection to the final instruction and defeats an appeal on the instruction.

If, as a result of an objection, a mistake or omission is discovered before the jury retires, the trial judge should use his/her own language in making the correction. If the discovery of error is not made until the jury has commenced its deliberations, the trial judge has the inherent authority to recall the jury and provide such correction as he/she considers necessary to avoid error.

GUIDES FOR GENERAL INSTRUCTIONS

CV 101.65 Define legal terms and expressions *[Rev. 12-1-07]*

The oldest rule for any form of communication is that the parties define their terms. All participating must start with an understanding of the meaning of words that will be used.

This is not to say that the court should define every word. The jury is presumed to know the meaning of common words and phrases. The court must define words that

have a special or technical meaning in the law as well as those that are not generally used. The language of the law contains unfamiliar terms and familiar words used in unfamiliar ways.

Definitions should not be abstracts or excerpts from decisions. They should be clear, practical, and related to the facts in each case. If possible, the dictionary and a thesaurus should be used rather than law books or law dictionaries. It must always be assumed that the jury will accept words in their general application in everyday life. If any other meaning is intended it must be expressed.

(Text continued on page 29)

Definitions are not easy to prepare because, at times, they become entangled with complex questions of law which require a narrow and precise use of words. Once a word is defined it acquires a fixed value throughout the charge. It should not be used again with a different meaning or implication. It may be used again with the same meaning without repeating the definition.

The use of similar, but not identical, or of synonymous, but different words may be harmless to a professional but the practice misleads the average juror. It can provoke confusion or prejudice from which there is no escape. The use of multiple definitions has the same effect even though legally such definitions mean the same thing and are technically correct. The use of several different words or definitions which mean the same thing reflects an understanding of the law, represents commendable research, and is impervious to attack on appellate review; however, it falls short of the simplicity and clarity required for the comprehension of lay persons who infer that different words and different definitions are used to convey substantially different ideas. This slow process of losing communication with the jury is described as "drifting." It is an unfortunate habit of overly conscientious judges who seek to reach the jury by expressing the same thing several times in different ways. If repetition is desired for *emphasis*, it should be accomplished in the same language and in the same words. The experience of drafting meaningful language for pattern or standard instructions has isolated and reduced this source of confusion in jury instructions. McBride, The Art of Instructing the Jury (Supp. 1979), Repetition, Section 5.08; Drafting, Section 10.13.

Legal terms that have technical significance must be defined and explained. Words or terms in common usage should not be explained. Any attempt by the judge to be a talking dictionary leads to multiplication of words requiring more explanations than the word or expression being defined. Terms and expressions that convey a clear and explicit meaning in ordinary use can be obscured by legal terminology that means the same thing. Also, unnecessary explanations can suggest to the jury that the word or expression has a legal meaning contrary to its general usage. Unnecessary refinements and examples obscure rather than clarify. *Olmstead v. Lumbermens Mutual Ins. Co.* (1970), 22 Ohio St.2d 212.

Some legal expressions have been so generally accepted that courts have been prompted to suggest that they require no explanation. The Supreme Court of Ohio has suggested that any amplification of the definition of reasonable doubt contained in R.C. 2901.05 is inadvisable. *State v. Van Gundy* (1992), 64 Ohio St.3d 230.

The idea intended to be expressed by a simple word can rarely be expressed with clarity by another word, and, generally, an attempted definition is misleading and not a proper explanation.

The list of words and expressions that require no definition is long and may surprise those who underestimate the jury. The jury consists of ordinarily intelligent persons. They must be credited with common sense and an understanding of the English language. It is never necessary to explain ordinary words or expressions when they are used in the sense in which they are commonly accepted. There is no magic in using

mystifying legal terms followed by definitions that translate their meaning.

It is a better practice and more enlightening to the jury to eliminate as many words as possible that require explanation. Too often, judges and lawyers identify rules of law by ancient pigeon holes and labels used in scholarly works on jurisprudence. These are convenient within the profession, but they require unnecessary definitions and a circuitous form of expression to translate them for the jury. The judicial artist avoids such labels in favor of clear and simple directions that point out the questions in issue and explain how they may be answered. McBride, The Art of Instructing the Jury (Supp. 1979), Section 5.04.

CV 101.67 Logical and consistent development ***[Rev. 12-1-07]***

No rule of law controls the order or arrangement of the parts of a general instruction; however, it is easier for the jury to understand the message if it is assembled in a logical sequence and proceeds from one step to the next, as in other forms of literary composition.

An instruction put together without a logical arrangement is difficult to comprehend. Where instructions related to a single subject are scattered from beginning to end, the average juror cannot collect the fragments and associate them with the appropriate issue.

As indicated earlier, a clear grasp of the specific issues is essential to a successful instruction. A precise statement of specific issues opens the door to the appropriate law and provides an orderly arrangement for presentation to the jury of the specific law.

If the instruction is to convey a clear and understandable message, it must be organized according to a plan of development that is consistent and logical. If there are flaws in the arrangement of the material, major surgery is required to establish order out of chaos. The jury should know when one subject has ended and another begun. Each subject should build up to the next and make it easier to understand what follows.

Arrangement is discretionary with the court and is of such a personalized nature that the subject is often ignored. Even among judges, there is a sensitivity to suggestions that a different arrangement would improve their message. Two persons seldom approach a problem from the same point of view or follow the same method to reach a solution. There are many approaches and methods that may be followed, any one of which is satisfactory if it is consistent and logical in attaining a complete result.

The attention given to standard instructions necessitated consideration of a method of presentation for publication. This problem was given special consideration because of the desire to present standard instructions according to a pattern of arrangement that would increase the usefulness of the material.

Research of the charge material by the OJI committee led to an arrangement that serves the need for a common method in which to present standard instructions in a sequence suitable for trial use.

This sequence lists common, basic subjects and definitions in a logical arrangement

and groups the issues and specific law prior to the concluding remarks. It appeared logical to the committee to define terms and general rules before discussing the heart of the case. It tends to sustain interest and to avoid premature judgments by jurors.

To be clear, consistent and logical, related and similar topics must be presented together. For example, burden of proof, evidence, and credibility should be grouped in the same part of the instruction. Logical arrangement is present if information is furnished the jurors in progressive steps that increase their ability to comprehend each successive part of the instruction. There is no limit to the variety of arrangements that may be found in general instructions. Presentation will vary according to the individual style of the judge and, at times, the special requirements of a case.

The major parts of an instruction should be arranged according to a logical sequence designed to prepare the jury for its work, guide it to its problem, and lead it step by step through the issues and to an intelligent verdict.

Transitional expressions. Whatever the arrangement may be, it is important to use transitional expressions so that the jury is reasonably prepared to follow and understand one point after another. It is helpful to indicate before each subject that a new topic is to be discussed. For example, it is advisable to say: "Since this is a negligence case, it is important that you understand the terms negligence and contributory negligence"; and "in addition to negligence, the plaintiff must establish that negligence was a proximate cause of his injury." Such expressions should not become formal. It is wise to change the pattern of transitional expressions from case to case so that they remain fresh and conversational. McBride, The Art of Instructing the Jury (Supp. 1979), Section 5.03.

CV 101.69 Complete, accurate and pertinent *[Rev. 12-1-07]*

The duty of the judge to provide a complete general instruction that outlines the issues, accurately explains the law on each issue, and furnishes adequate general information and advisory help, is one of law.

The image of the judge during the frontier era as a spectator in a "cracker barrel" contest between counsel and the jury as to what the law might be has been abandoned. The common-law procedure survived the pressure of the eighteenth century and preserves, as a constitutional right, the sovereignty of law over individuals. Rights are guaranteed only when the court--not counsel or the jury--defines the law. A failure of the judge to instruct the jury on the law and to require the jury to accept the law is a denial of a fundamental right to due process.

When the issues have been outlined with precision, there are a limited number of items of specific law in the average case. The balance of the instruction consists of conventional subjects that should always be given. An instruction is not complete unless each function is adequately covered. Completeness is as important as accuracy.

The emphasis upon completeness sometimes leads to abstract statements of law that are not pertinent to the issues. No matter how correct the statement of law may be, if it is immaterial it serves no purpose and may be prejudicial.

An instruction that is complete, accurate, and pertinent must contain the specific law applicable to the issues. The specific law may include any one of the many and varied aspects of substantive law, the presentation of which are beyond the scope of this chapter. McBride, The Art of Instructing the Jury (Supp. 1979), Section 5.02.

The fewer instructions the better. No instruction should be given unless it is both necessary and applicable to the fact situation at hand. The most expressed apprehension of members of committees drafting instructions was that a given instruction, or some aspect of it, would be error if given where the facts would not justify it, or unless given in connection with another. It should not be assumed that any particular instruction may be safely given merely because it appears to be a correct statement of the law. It must be appropriate to the case and often must be correlated to other necessary instructions.

Whether a general instruction is complete, accurate, and pertinent must be determined by the charge as a whole and in connection with the testimony and with other portions of the charge bearing upon the same subject matter. If the instruction cannot be misunderstood when construed as a whole, a shortcoming in its parts is not fatal. However, if the general instruction contains principles of law contradictory or inconsistent with each other, it cannot be presumed that the jury followed the correct one. Such an error is presumed to be prejudicial. The same may be said of an instruction that misleads, confuses, or misdirects the jurors, or diverts their minds from the points in dispute with the introduction of issues or law outside the case. The introduction of extraneous matters of law or fact is erroneous and at times prejudicial.

CV 101.71 Ordinary, understandable language *[Rev. 12-1-07]*

The judge undertakes in a few minutes to elevate lay persons to the highest pinnacle of sovereign service. It is a grave and difficult responsibility that must be carried out in the clear, concise language of the average juror.

A jury instruction is not a magical incantation, the slightest deviation from which will break the spell. The poorest examples are formalistic codes recited by a trial judge to please appellate judges. An instruction at its best is a simple communication from trial judge to a jury of ordinary people who are entitled to be appraised in terms of its net effect. Instructions are to be viewed in this common-sense perspective and not through the remote and distorting knothole of a distant appellate fence. *Time, Inc. v. Hill* (1967), 385 U.S. 374.

The necessity for direct and simple English was emphasized by Judge John M. Matthias in the opinion in *Bahm v. Pittsburgh & Lake Erie R. Co.* (1966), 6 Ohio St.2d 192.

> "A court in considering the propriety of any jury instruction must always bear in mind that the purpose of the jury instruction is to clarify the issues and the jury's position in the case. It must be remembered that juries are composed of ordinary men on the street, not trained grammarians, and that fine distinctions in the meaning of words or phrases are not ordinarily recognized by the average lay person. Thus, in considering the propriety of any

instruction, the meaning of the words used in the instruction must be thought of in their common meaning to the lay person and not what such words mean to the grammarian or the trained legal mind."

The language of legal decisions is not appropriate for this purpose. It is not fair to judges of reviewing courts to assume that any comment they make in the course of an opinion, written for lawyers and judges, may be isolated and used for a jury instruction. Were such a possibility to hover over the writers of case opinions, the circumspection that it would require would be unnecessarily burdensome, possibly intolerable. Some appellate judges have never instructed a jury and are not familiar with the problem of instructions.

The simplicity of accurate, but conversational, language is attainable by few judges. Spontaneous oral delivery may accomplish understanding more readily, but it is fraught with the danger of reversal by the reviewing court which considers the printed word out of its environment of the trial. A judge who instructs conversationally without a prepared script tends to ramble, to weaken his or her statements, and to become obscure. Occasional use of conversational language maintains attention; its continued use is dangerous.

A more reasonable objective, and one within the reach of all, is the development of understandable language. More attention should be devoted to the preparation of meaningful language and the art of delivery than to conversational skills. A few well-chosen words are more readily received and better remembered than long, loosely organized conversation. The power and compelling logic of simple and direct language is the most effective tool of any author, judge, or lawyer.

Latin and other foreign expressions should not be used except in rare situations where an explanation is not required. Jurors were advised in a criminal case not to read, view or listen to news reports and cautioned that they might be questioned during trial to discover if they obeyed this order. "In other words," said the court, "news stories are *verboten* during the trial." The jury chuckled, suggesting a degree of understanding that was substantiated when they were polled on several occasions.

Ordinary language requires all the skill of a master and the ingenuity of a professional author. It must keep in mind the limited time at the judge's disposal and the tremendous gap he/she must bridge to bring the specific law to the jury. Certainly it must be accurate, but if it fails to bridge the gap of understanding, it might as well not be given.

Conversational expressions and appropriate ad libs serve a valuable purpose in keeping the circuit open to the jurors' minds and in sustaining their interest. Such techniques should be used even though instructions are prepared in advance of delivery.

All the tricks and suggestions of the professional writer and speaker should be used to sustain interest, to introduce major subjects, and to connect the law to the issues; they should be avoided, however, when the issues and the law are explained, because they may detract from the seriousness of their purpose. While the language of the

judge must be intelligible to the jury, it should never fall below generally acceptable standards of English or decorum.

Language is a living thing--shifting, changing, receiving new strength, and different meaning in daily use. The language of instructions must be alive in today's English. It must bring the law to life and create jurors who know and feel a share in the living law that applies to the controversy submitted to them for solution.

Unlike the professional writer, the trial judge cannot and should not strive to satisfy himself/herself as to the style of his or her message. Style is personal to the author and is subservient to comprehension and understanding by the jury. Style is determined by the judge, but the opportunity to improve is limited to future cases. Time limitations discourage improvement on current charges. Style, wit, and elegant statements, no matter how scintillating, can distract from the dignity and clarity that a public trial demands.

While humor has a limited place in the courtroom, there may be times when a lightly humorous remark by the judge relieves the tension and encourages a better climate for a fair and impartial consideration by the jury. Such instances are infrequent. They should never be used at the expense of any person or party.

Jurors like to know that the judge is human. This can be demonstrated by humility, friendliness, consideration of others during trial, efficient administration of the proceedings, and firm control of the law as it unfolds in the courtroom. McBride, The Art of Instructing the Jury (Supp. 1979), Section 5.06.

CV 101.73 Brevity and repetition *[Rev. 12-1-07]*

Brevity reflects clear reasoning and precise speaking or writing. It is a blessing acquired by painful and laborious revision. The trial judge does not have a long time to prepare his/her instructions. Often, the process of editing can be done only after a charge has been delivered. The frequency with which many statements appear in instructions, however, justifies continuous efforts to achieve brief and precise language for future charges. The criteria for a good instruction is not its length but its accuracy, its completeness, and its comprehensibility to the jury.

Certainly brevity is a virtue for which jurors are everlastingly grateful, but brevity is not an end in itself. It can, if not expertly accomplished, be a serious fault. The virtue in brevity is not in time saved, but in thoughts conveyed.

No one will deny that an instruction should be as brief as possible, but brevity that creates an incomplete, inaccurate or ineffective charge fails to serve the cause of justice. True brevity means clear and concise instructions that can be understood. Such language reduces the length of the charge but increases its comprehensibility.

Although it is not prejudicial for the court to give lengthy and involved instructions, such practice is not conductive to the best results and has been condemned. Lengthy instructions mentally fatigue the jury, cause inattention and confusion, and provide little help in reaching a correct verdict. However, a charge that is lengthy, but provides a full and impartial outline of the evidence and the law, stated in such plain and explicit

language that it is impossible to conceive how a jury could fail to understand it, is not erroneous. Long instructions are as unpopular as extended sermons, but are not reversed for such similarity.

Each judge struggles with instructions in his/her own way and with his/her own talents. Seldom do two persons think, speak, or write alike. Rare judges are blessed with a swift clarity of mind that can expose problems with a conciseness of expression that is astonishing. Others are patient in their mental habits; they reach the same result after a roundabout method and a detailed explanation.

The jury has equally diverse abilities to comprehend. The process of their selection has a tendency to seat the average. It produces a representative group whose receptive capability is so varied that any attempt to seek a single level of communication is a mistake. If anything, this level is higher than generally appreciated.

The intellectually quick judge must extend himself/herself for better reception; the intellectually patient, if not verbose, may be more effective.

As with any form of communication, a change of pace, effectively timed to subject matter and necessity, is more apt to receive the constant attention of jurors. Short, staccato sentences make a sharp, sudden impression. If continued they lose their effectiveness. Long sentences slow the pace and prolong the impact and if continued may destroy the message.

Brevity is not achieved by deletion. It is obtained by clear and logical expressions that pierce the mind like a rapier and leave an impression that is sharp and deep. Brevity commands attention because it is understood with no effort. Achieving it is as demanding upon the speaker as it is refreshing to the audience.

Repetition. Brevity and repetition are separate problems. No matter how short a statement may be, it offends if it is used over and over again. An instruction that is well organized will confine each subject and avoid unnecessary reference to it elsewhere.

The rule against repetition has its exceptions. Repetition is useful as an educational tool for the very reason that it adds emphasis to what is said. It is effectively used in cautionary instructions relating to the duty and function of the jury. Recess instructions are repeated daily, many times during the trial. Since the number of jurors required to return a verdict varies, this should be emphasized to relieve jurors from reaching a unanimous verdict when it is not required.

Every general charge contains repetition of words and expressions; less frequent is the repetition of definitions and explanations of substantive law. No prejudice is encountered unless one subject is given such overwhelming prominence as to overshadow others to the point that the jury is misled.

Repetition is prejudicial only when it takes on a partisan turn and unnecessarily emphasizes the law as to one party to the prejudice of the other. The time and number of words applied to each party will vary from case to case. Very little need be said of a defendant who stands on a general denial and offers very little or no evidence. There is no such thing as equal time in testimony or in instructions. Each issue must be fully

covered, but it should be fairly and impartially done to avoid conveying any opinion of the judge as to the outcome.

The most common form of repetition exists in expressions referring to the required weight of the evidence. The tendency is to repeat such words in connection with all of the issues. The burden of proof should be defined and placed upon the proper party or issues as a basic part of the charge. It is not necessary to repeat this rule unless the burden shifts or is shared by the other party because of his or her defense.

There are technical expressions which encourage their being stated again and again. To the extent that these are merely technical, their repetition is not prejudicial. "The greater weight of the evidence" and "beyond a reasonable doubt" have been stated a dozen times in one instruction without encountering reversal. However, it is a habit that can and should be avoided.

The growing practice of giving preliminary instructions and the necessity of giving others during trial raise the question whether they should be repeated in the final charge to the jury. Regardless of what may have been previously given, the final instruction must be a complete, unified presentation of all the law essential to the case. This does not mean that every earlier instruction must be repeated. If, for example, it was optional, cautionary, or related to the limited purpose of testimony, it should not be given again.

Most importantly, there is a difference between *careless repetition* and *intentional reiteration*. Carelessness is indicated by the unnecessary use of a variety of different words, expressions, as well as definitions, all of which mean substantially the same thing. This handicap to meaningful instructions promotes *drifting* of the minds of the jurors. It increases, rather than decreases, the gap that must be crossed to convey understandably the law necessary for the jury. The presence of this fault suggests that the judge has not carefully developed his or her language for clear and precise information. It suggests that he or she has collected definitions from different sources and accepted them without personally considering exactly what he or she would like to say. Careless repetition has none of the advantages that might otherwise be gained by repeating selected words or expressions.

International reiteration serves to drive home a single point by repeating it in language so clear and so similar that the jury recognizes it for the second or third time and appreciates that this is exactly what the judge means. This form of reiteration of important portions of an instruction is useful in oral instructions. It should be used sparingly for major points, and then only when it can be done fairly and impartially.

CV 101.75 Tailor to individual case; special requests *[Rev. 12-1-07]*

An *abstract* instruction is a general statement of law, extracted from a decision, from a charge previously used, or from a standard instruction, which either has no reference to the circumstances of the case or is not specifically connected with the issues. Though a correct general statement, an abstract instruction is accompanied by the failure to link the law to the immediate parties or issues. Such failure indicates that the trial judge did not go far enough to define the issues and the law in his/her

presentation to the jury. Where it is reasonable to conclude that the jury was unable to supply this missing link and may have been misled, the judgment will be reversed on review. *Marietta & Cincinnati RR. Co. v. Picksley* (1874), 24 Ohio St. 654; *Bradley v. Mansfield Rapid Transit, Inc.* (1950), 154 Ohio St. 154; *Coal Co. v. Estievenard* (1895), 53 Ohio St. 43; *Kohn v. B.F. Goodrich Co.* (1941), 139 Ohio St. 141. An instruction must concisely and unambiguously state the law applicable to the case before the jury. This is not done by abstract rules or principles which only a legal technician could correctly apply.

Instructions are designed to draw abstract principles of law into the realm of specific situations. A refreshing and colorful instruction is one that moves quickly to the specific issues. Jurors come to life when specific issues are drawn tightly, and the specific law for which they have been waiting is presented. The specific is the crux of every lawsuit. The specific is the turning point in every instruction. If simply stated, the specific law morally compels jurors to reach a fair and just verdict. It matters little how well the jurors comprehend abstract principles of general law. Justice is attained by the application of specific law to specific facts. McBride, The Art of Instructing the Jury (Supp. 1979), Section 15.05.

It has been said that standard instructions may be quite helpful, but like all canned products they necessarily lack freshness. Old instructions are equally "canned" and they are so seasoned and spiced as to be unfit for other occasions.

Making over an old instruction is like refitting a suit for a different person: it never reflects the interest or spirit of a new creation. So many adjustments are required to properly outline new issues and explain different law that it is easier to draft a new instruction. Old charges carry the inherent danger that they may have been reversed or that the reviewing court affirmed on other grounds.

These dangers and the awkward service that old charges present led to the development of standard instructions which can more readily be assembled in new instructions. Standard instructions are more valuable as a source because they are flexible and readily adaptable for use. They are drafted by committees to conform to state law and are kept current with the decisions.

Caution should be used with old instructions as well as with new patterns. Departure from standard language should be carefully considered to avoid an error the committee may have uncovered. But deletions and additions are always required to modify and adapt any instruction to a particular case. It is important to understand the purpose and method of the drafting committee and to tailor the material for individual use. The trial judge must recognize the help that is available for his/her use and then to redesign it into an original composition for a specific case.

Standard instructions contain complete statements upon separate subjects. A great deal is left to the skill and resourcefulness of the individual in molding them into a proper instruction. Patterns can be made fresh, personalized, and brought to life by references to the parties and the issues in a particular case.

The secret of a successful instruction lies in outlining the specific issues and

associating each issue with specific legal principles that apply. Any failure to tailor standard or other instruction material to the particular case results in abstract information which the jury may, or may not, find appropriate to the case. McBride, The Art of Instructing the Jury (Supp. 1979), Section 5.10.

Special requests. Although a request by counsel for law to be included in the general instruction is considered in this volume, it is important to note that if the subject matter of the request is adequately included in the general instruction, no modification need be made. If the subject matter of the request is proper and is not adequately and properly covered in the language of the general instruction, then such instruction must be modified and tailored to the particular case. In the latter event, the addition is not delivered separately but is incorporated in its appropriate place as a part of the general instruction and is stated in such language as the court selects, consistent with the entire instruction. Special requests are usually designed to tailor the law to the particular case. The necessity for requests is avoided when the trial judge does the tailoring.

CV 101.77 Objective, fair and impartial *[Rev. 12-1-07]*

Objectivity and impartiality are the essence of judicial responsibility. Jurors have a high regard for the position of the judge. They are alert to the slightest appearance or suggestion of partiality. Every instruction should be examined carefully to be certain that it is fair and accurate, does not infer more than is expressed, and does not suggest an opinion on factual issues.

General instructions must emphasize the specific issues and specific law; however, they should avoid giving unnecessary prominence to facts, issues, or law that relate to one party or the other. Misplaced emphasis is often evident in formula and argumentative instructions. The latter tend to distract the attention of the jury from the real issues and suggest an improper significance of other factors. This kind of partiality is subtle and unconscious, encouraged in many instances by the nature of the facts, by the difficulty experienced in stating the law, or by quotations from decisions not couched in language for the jury.

Partiality is manifested when the instructions take on some form of argument. It is the function of counsel to argue the case and present to the utmost the client's position. The inherent danger of instructions containing argument or assumptions of fact may take many forms. Some appear to be quite innocent and may have been approved by reviewing courts in other cases.

An argumentative instruction may occur when the court yields to the urging of counsel to instruct on issues not in the case. Common illustrations may be found in negligence cases. Liability of insurers and sole negligence are rarely proper and are pressed to the limit in closing argument for partisan advantage.

It is common in civil and criminal trials for counsel to create a "red herring" question of law or fact, to blame another person, not a party, to distract the jury from the issues it must decide. It is human nature for a party to urge responsibility on someone else, and to this extent such strategy may be suitable for counsel. But when the judge is deceived by partisan strategy and instructs on subjects not in issue or on

collateral explorations and arguments of counsel, the judge abandons a judicial position of impartiality and collaborates with one party to the prejudice of another.

Most judges realize the weight of their last words upon the jury and taper off their general instructions with cautionary information, directions as to the form of the verdict, and the concurrence of agreement required. This creates a balanced instruction that does not give either party the benefit of the last words.

Error or prejudice may not be predicated upon the mere fact that there are more references in the instruction to one party or the other. The references to each party and their legal rights are controlled by the nature of the evidence and the extent to which the law must be developed. It is more difficult and requires more time to present a plaintiff's position than a defendant's, particularly if the latter has no basis for affirmative relief.

At the conclusion of the general instructions, counsel is required to make objections thereto or risk a waiver thereof. This is a delicate moment in the trial when the jury is impatient with any delay. Because the rule requires objections to be made out of the hearing of the jury, the safer practice is to have a conference on the record outside the presence of the jury before concluding the instruction. This point in the charge may be signaled by an inquiry from the court whether counsel have anything further. If so, a brief recess provides the fairest opportunity to register objections, make corrections, and complete the record. Last-minute communications before the jury, even if out of their hearing, place a complaining lawyer in an embarrassing position. If the final objection raises no new matter, many judges permit counsel to perfect the record after the jury retires. This practice is satisfactory if the court is certain there is no possible error.

A trial judge should make every effort to ensure that each instruction and the manner in which it is delivered is objective, fair, and impartial. McBride, The Art of Instructing the Jury (Supp. 1979), Section 5.05.

CV 101.79 Deliver effectively *[Rev. 12-1-07]*

Efforts to develop and improve meaningful instructions are wasted if the charge is read in a dull, listless manner. The effectiveness of any oral instruction is lost if effort is not applied to its delivery.

There is a tendency by judges to minimize the importance of artistic skill in delivery. The reading of instructions often becomes a routine and unpleasant ritual that displays no concern for the appellate court, a lack of interest by the judge, and no consideration for the jury. This attitude is contagious. It causes a similar lack of interest, if not a lack of comprehension, by the jury.

The *manner* in which an instruction is read is fully as important as the *text*. The trial judge is in the position of a teacher whose purpose is to educate jurors in an effective way to enable them, of their own will and judgment, to arrive at a just verdict. Because the law requires a high degree of technical accuracy and, of necessity, certain words must be used that are not generally familiar to laymen, instructions are not easily

understood. The monotonous reading aloud, especially that droning, lifeless reading that all trial lawyers have heard, cannot be expected to instruct or interest the jurors in the law. Proper instruction depends upon diction, inflection, enunciation, and meaningful expression.

Interest in delivery must be sustained throughout the charge and not confined to one side of a case. The emphasis or lack of emphasis in the judge's voice could be perceived by the jury as an indication of the judge's view as to which party is entitled to a verdict.

Jurors conscientiously seek a fair decision. They experience for the first time in their lives the awesome feeling shared by those who sit in judgment. Although they are bolstered by a group decision, they rely upon the advice provided by the court.

Jurors are highly receptive to implications that may be conveyed by a movement of the body or a modulation of the voice. At the time of delivery the judge has an opinion of the proper result and of the particular law or fact that should be decisive. An unconscious degree of effort or sincerity can be detected when a certain portion of the instruction is delivered. This stronger effort or feeling sometimes comes across to the jury, but is not apparent in the printed record. Other forms of misplaced eloquence can influence the verdict.

A lack of confidence in delivery or being self-conscious could cause a judge to slip into the habit of an even, monotonous tone that convincingly establishes impartiality and lack of interest in the outcome.

This is unfortunate. The judge should never become so timid or cautious that his or her delivery lacks life and interest. It is important that every part of the charge be delivered with feeling and effectiveness. A judge's delivery should reflect confidence in the law and the ability of the jury to comprehend the same and to discharge their duties.

The *art of delivery* is inextricably associated with skill of arrangement. Speech and writing, like music, should begin quietly with close attention to details. It should rise and fall to maintain interest and attention until it swells to a climactic point and then ebbs to a formal close. Each side should be represented in each portion of the instruction so that it reflects the conflict of facts and provides the law which leads to the solution and a victory for justice. An instruction so arranged seldom discloses the opinion of the judge. It furnishes few opportunities for unconscious emphasis for either side

An arrangement of material suitable for this style of delivery is one that begins generally with basic information and definitions; proceeds to outline the issues created by the conflict of facts; supplies the law as to the rights and duties of each party; and closes with details necessary for the verdict.

Each performance is a new case with new parties and new jurors. To jurors this is a fresh and bewildering experience. Every judge--new or experienced--works with a fresh jury. Even though the judge may have explained the same point in a thousand

cases, the instructions in each case must be approached with the same attention to detail and delivery.

Instructions should be delivered in a strong, clear voice and in a serious but friendly tone. They should be directed to the members of the jury. Use of the pronoun "you" is recommended. For this purpose the presence of the lawyers and spectators should be ignored. One practice is to move the chair at the bench closer to the jury to dramatize the importance of the message and of the persons to whom it is delivered. Some judges do not permit spectators to enter or leave while they are delivering their instructions.

Because most instructions are written or at least generally prepared in advance, it is well to develop the ability of reading, but not appearing to read, so that the message is accurate but exudes the appearance of oral delivery.

A hidden teleprompter is an innovation not lightly to be ignored; however, for economic reasons, triple spacing and large type are a feasible substitute. Large, readable type with generous spacing of lines is a convenience in reading an instruction. Elite type and close spacing should be avoided. McBride, The Art of Instructing the Jury (Supp. 1979), Section 5.09.

CV 101.81 Language and style *[Rev. 12-1-07]*

If a general instruction is clear, complete, and accurate, the language and style of the trial judge are legally immaterial. On review, a general instruction is tested only for technical accuracy. No consideration is given to the effectiveness of the charge in oral delivery or the extent to which it developed the interest and comprehension of the jury. The writers of a few opinions have gone out of their way to stress that the language used must be directed to lay persons and that color and interest should be maintained; however, as with all forms of communication, finding language suitable for clear expression and comprehension by the jury is a difficult assignment. Time restrictions impose another handicap upon the trial judge who may have little opportunity to revise and edit instructions. The opportunity to do so is one of the advantages of standard instructions.

However, the final instruction is exclusively for the benefit of the jurors. The trial judge must communicate precisely what the jurors want and need to know to reach a fair and just verdict. To capture and maintain the interest of jurors the judge should use all the tools of oral communication to ensure understanding and comprehension of the specific problem and the specific law.

This is a demanding obligation that sets the trial judge apart from all other members of the bench. In the area of language and style, the trial judge has a wide discretion to adopt the skills of authors of the written and spoken word to give drama to the law and "bring it home" to the jury. This is not to suggest an elegant style or the use of fastidious words. Instructing a jury is a practical, not a fine art; it yields to its function of simple, oral communication addressed to laymen and requires a freshness of language evident in ordinary conversation.

Oral communication invites phonetic problems not apparent in the printed word.

These occur in different words that sound alike and in prefixes that reverse the meaning of the word. A common example is "a proximate cause" and "approximate cause." Another is "in voluntary" and "involuntary." Many words have phonetic similarities that encourage undetected mistakes.

There are of necessity many parts of a general instruction in which maintaining interest and freshness is difficult, and it must be accepted that jurors are hearing this information for the first time. This delivery should respond to their needs and not reflect the familiarity of the court with the subjects discussed.

The critical point in every general instruction is the presentation of the issues and the specific law. The specific is the turning point in every lawsuit. A refreshing instruction is one that moves quickly to the specific and, if simply and concisely stated, morally compels jurors to reach a fair and just verdict.

A judge *speaks* to the jury. He/she *writes* for the reviewing court. This dual function demands the avoidance of mistakes incident to impromptu composition and eliminates the flexibility of extemporaneous presentation. Because nearly every general instruction is written in advance and read to the jury, it is important that the words used be clear, meaningful, and sometimes conversational. The ability to write general instructions in clear and eloquent language, suitable for oral delivery and quick comprehension, is the test of a good trial judge.

Each judge must draw upon his/her own resources and experience. Each instruction will vary according to the individual, to the case and to the time available for its preparation. The oral delivery of instructions justifies resorting to the best and most effective use of language available. Every instruction is a test of the skill of the judge, a test which is not graded in points or personal success, but by justice between the parties. McBride, The Art of Instructing the Jury (Supp. 1979), Chapter 15.

INSTRUCTIONS DURING DELIBERATIONS

CV 101.83 During deliberations *[Rev. 12-1-07]*

Once the jury commences to deliberate on a verdict, the procedure outlined in the rules for requests and objections to the general instruction has no application. At this late stage of the trial, the delivery of further instructions rests in the inherent power of the court whenever the circumstances or the ends of justice require it. Further instructions may be initiated by the court, by the request of counsel, or by the jury. As has been repeatedly pointed out in this chapter, the trial judge has the inherent power to control the trial and the law.

Any communication by the court to the jury must be delivered in open court and in the presence of counsel and the parties. Counsel and the parties must remain available or within quick recall by the court. Although notice to the parties and counsel is necessary, the reasonable time for further instructions during deliberations is considerably reduced by the circumstances and should be measured by minutes and not by

hours. A secret communication after the jury begins deliberations is error and, absent affirmative evidence to the contrary, cannot be said to be harmless. An instruction in the absence of the parties and without affording them an opportunity either to be present or to make a timely record of objection constitutes error of a serious magnitude. *Fillippon v. Albion Vein Slate Co.* (1919), 250 U.S. 76; *Krieger's Cleaners & Dyers, Inc. v. Benner* (1931), 123 Ohio St. 482; *Hrovat v. Cleveland Ry. Co.* (1932), 125 Ohio St. 67; *State v. Grisafulli* (1939), 135 Ohio St. 87. If after reasonable notice counsel fails to appear, additional instructions may be delivered in his/her absence. *Campbell v. Beckett* (1858), 8 Ohio St. 210.

Despite efforts to settle questions regarding instructions before deliberations commence, the trial judge should recall the jury after it has retired to correct errors and omissions or to clear up ambiguities that come to the court's attention. The trial judge bears the ultimate responsibility for the accuracy and completeness of his or her instructions, and has the obligation to correct any serious mistake. If an error of law is discovered, the duty to correct it is mandatory and a failure to do so a clear abuse of discretion. The discharge of the jury's responsibility for reaching conclusions from the testimony is dependent upon the judge's duty to furnish the guidance required by means of a correct, lucid statement of the law relevant to the problem presented. Sometimes a re-reading of the applicable portion of the final instruction is sufficient; however, if the language originally delivered is incomplete, confusing, or does not directly respond to the problem, a perfunctory re-reading of the very instruction which led to the difficulty does not meet the duty of the trial judge.

The trial judge is the legal advisor of the jury. Disclosure within the final instructions of this duty of the court and of the right of the jury to request a further explanation of the law would go a long way to improve the instructional administration of justice and to dispel the lingering doubt that jurors might not understand the law.

Questions by the Jury. When the jury exposes a problem by its questions to the court, the trial judge should clear it away promptly and accurately. Although questions by the jury may be made in open court, the better practice is to request that inquiries be made in writing. This provides an opportunity for a conference on the question with the attorneys before delivering the response. At times, questions by the jury are not clear, in which event a cautious dialogue in open court by the judge and the foreperson may disclose the problem.

Requests by the jury for additional facts or for a repetition of testimony should be considered carefully by the court and counsel. Factual matters in the record are exclusively within the province of the jury. In this area the judge may not provide additional information, and may not express opinions concerning what the jury has heard. Although the judge may review the testimony, the requirement that it be done fairly and impartially is frequently impossible and never free from objection. A better practice is to have the jurors indicate precisely the witness and testimony to which they refer and the object of their inquiry. Once this is determined, portions of the testimony of such witness or witnesses on the subject may be read to the jury. Counsel for each party should be given the opportunity to locate the appropriate evidence relating to the

question. There is no reason why jurors should not be permitted to refresh their recollection of the testimony. Reading all appropriate portions of the record ensures that this is accomplished fairly and impartially. McBride, The Art of Instructing the Jury (Supp. 1979), Section 3.53.

VERDICT AND DISCHARGE INSTRUCTIONS

CV 101.85 Accepting the verdict *[Rev. 12-1-07]*

A verdict is the culmination of all the efforts at trial, and although usually brief and succinct, this final instrument deserves a careful inspection to ensure that it is complete, accurate, and properly endorsed. If the verdict is indefinite, incomplete, or ambiguous, it is the duty of the judge to clear up the ambiguity and, if necessary, to instruct the jury to resume deliberations for that purpose. The verdict must be complete and cannot be bolstered by reference to pleadings, evidence, or instructions of the court.

Even where there is a ministerial defect and the intent expressed in the verdict is obvious to the court, the safer practice is to question the foreman and secure the approval of the jury to any change in the verdict by the court. This may be done by a new verdict form or an amendment to the original.

If it appears that the verdict is genuinely defective, incomplete, or does not reflect the resolution of the issues or the intent of the jury, the verdict should be rejected and the jury required to continue its deliberations with such additional instructions as are appropriate to the situation. Jurors should be given every opportunity under appropriate instructions to amend or correct their verdict in either form or substance before being discharged. *Barnes v. Prince* (1974), 41 Ohio App.2d 244.

With interrogatories. When a general verdict is accompanied by interrogatories, neither instrument should be accepted nor the jury discharged until adequate time is taken, in the absence of the jury, to determine that the responses to the interrogatories are not inconsistent with the verdict. The slightest mistake at this point is certain to become a major issue on appeal. Any ambiguity or inconsistency must be resolved by the jury. In this respect, Civ.R. 49 expressly authorizes the trial judge to require further consideration by the jury of its answers to the interrogatories and its verdict.

When requiring further deliberations, the judge should apprise the jurors of the subject of their further consideration and the law applicable to it without, however, conveying any impression or opinion on the conclusion they should reach.

Unique problems will arise in conjunction with a narrative response question on which the jurors will not understand what is expected of them in the absence of explicit instructions requiring them to recite the facts and circumstances which they find existed. Where the jurors have a duty to recite "in what respects" a defendant failed to use ordinary care, they should be instructed to report each fact or circumstance that they find constituted a failure of due care.

CV 101.87 Discharge Instructions *[Rev. 12-1-07]*

After the verdict is accepted and before discharging the jury, it is proper to thank the jurors for their public service, advise them on arrangements for ensuring payment for their services, lift restrictions imposed upon them during trial, and instruct them on their personal rights with reference to inquiries by counsel, the press, or others concerning their deliberations. If the same jurors are to be used in another case, the safer practice is to restrict all inquiries and conversations. If jurors are discharged from further duty, they are entitled to know that they may not be compelled to respond to questioning by anyone except by direction of the court. Jurors are not experienced in the consequences of their public service. The least the court should do is to apprise them of their right of privacy and of the unpleasant possibilities if they choose to reveal subjects buried in the secrecy of their deliberations. The necessity for informational instructions in this area varies with the circumstances, parties, and counsel in each case.

Comment by the court to the jurors on the nature of the verdict is a temptation to be resisted. Praise or criticism for the verdict reached is unnecessary, and although the opinion of the trial judge may give some satisfaction to those who served, it frequently becomes a matter of public delight, disappointment, or frustration within the judicial system. Such comment is also inappropriate if the same jurors are to be assigned to other cases or if the comment is made primarily for incidental personal benefit to the trial judge.

This moment of discharge presents an opportunity for conversation with the jury concerning the effectiveness of the instructions; however, this has inherent dangers. A verdict does not terminate the duty of the trial judge. The practice of the court conducting discussions with jurors is not condoned if the information discovered is, or may be, used as a basis for subsequent rulings on post-trial proceedings. Such discussions may so taint the exercise of future discretion that it is impossible for a reviewing court to determine the basis for the trial judge's decision. The practice of fraternizing with jurors after the verdict may give the impression that the judge was improperly influenced on post-trial rulings. *Rohde v. Farmer* (1970), 23 Ohio St.2d 82. McBride, The Art of Instructing the Jury (Supp. 1979), Section 3.68.

(Rcl.08S2CIV–11/2008 Pub.43461

TITLE 2

BASIC CIVIL OUTLINE AND SAMPLE INSTRUCTIONS

Chapter CV 201 CHECKLISTS

Chapter CV 203 SELECTING THE JURY: SAMPLE INSTRUCTIONS

Chapter CV 205 PRELIMINARY INSTRUCTIONS: SAMPLE INSTRUCTIONS

Chapter CV 207 FINAL INSTRUCTIONS: SAMPLE INSTRUCTIONS

Chapter CV 201

CHECKLISTS

CV 201.01 Trial outline/checklist ***[Rev. 8-11-10]***

CV 201.01 Trial outline/checklist *[Rev. 8-11-10]*

COMMENT

The following trial outline for presentation of standard instructions is provided as an example trial judges may wish to consider and modify as appropriate.

(*Insert date of trial*) Trial – (Jury) (Bench)

Filed: (*Insert date filed*)

Case No. (*Insert case number*)

Accident/Event date: (*Insert date of accident or event*)

PARTIES

(*Insert names of parties*)

ATTORNEYS

(*Insert names of attorneys*)

Pleadings

_____ Complaint – e.g., Motor Vehicle Negligence

_____ Answer – e.g., Deny, No claim, Comparative negligence

Preliminary Matters (case specific for pre-trial conference w/ attorneys)

_____ Settlement possibilities

_____ Anticipated length of trial

_____ Trial day time schedules (e.g., daily start and end times, recesses)

_____ Use of electronic devices

_____ Rules on voir dire

_____ Stipulations

_____ Witness lists; people at the trial tables

_____ Exhibits – mark and exchange (e.g., numbers for plaintiffs, letters for

defendants)

_____ Judicial preferences (e.g., objections procedure, approaching/instructing, podium use, witnesses, side bars, proffers, note-taking/questions by jury)

_____ Proposed jury instructions – timing and content

_____ Pre-trial motions (e.g., in limine, separation of witnesses)

_____ Neutral judicial fact statement for voir dire

_____ Discussion of anticipated procedural, evidential, and legal disputes (e.g., use of demonstrative evidence, equipment needs)

_____ Procedural issues involving multiple parties (e.g., peremptory challenges, order of participation in questioning, opening statement and final argument)

_____ Videotape deposition procedure (rulings on the record prior to presentation)

_____ Attorney questions/concerns

_____ Pre-Trial Record – In open court, no jury (anything that the court or counsel want on the record).

_____ Jury Selection and Admonitions

_____ Preliminary Jury Instructions – Common instructions may be given prior to the presentation of evidence to assist the jury in their role as fact-finders as they listen to and consider the evidence in areas of the weight of the evidence, utilization of instructions, impartiality, attorney conduct, objections and rulings, credibility of witnesses, burdens of proof, and forms of testimony. If the court is going to permit note-taking or juror questions during trial, these instructions must be given at this time.

_____ Jury View (Discretionary) – The court must set the ground rules and determine appropriate supervision.

_____ Opening Statements – Opening statements of counsel are concise and orderly descriptions of each side's claims and defenses and the evidence counsel expect to produce in support of those claims and defenses. They are not evidence. Each side will have the opportunity to address the jury.

_____ Presentation of Evidence

_____ Pre-charge Conference – Review final instructions with attorneys with final decisions on the record prior to final arguments.

_____ Final Arguments – Final arguments of counsel are opportunities for each side's attorney(s) to summarize the evidence and argue their client's respective positions. They are not evidence. The side with the burden of proof will address the jury first and last.

_____ Final Jury Instructions – These are complete instructions regarding all the law and procedure needed by the jury to reach its verdict, including, generally, all

applicable preliminary instructions as well as instructions regarding applicable substantive law, deliberation, and verdict. Commonly, final instructions are given in the following order: (1) general instructions, (2) disputed issues instructions, and (3) deliberations instructions.

_____ Alternate jurors – Are excused or held pursuant to rule. (If you hold the alternate jurors, do so outside the hearing of the trial jurors.)

_____ Deliberations

_____ Verdict

_____ Discharge Instruction

Chapter CV 203

SELECTING THE JURY: SAMPLE INSTRUCTIONS

CV 203.01 Welcoming remarks *[Rev. 10-23-10]*

CV 203.03 Voir dire questions: sample instruction *[Rev. 1-22-11]*

CV 203.01 Welcoming remarks *[Rev. 10-23-10]*

COMMENT

The judge should take this opportunity to introduce himself/herself and the court staff. The judge should address a cellular telephone use policy or other rules unique to that judge's courtroom. The judge may explain the purpose of juries as an essential element of the American justice system. It is also an opportunity to acknowledge the public service of the jurors or prospective jurors.

1. INTRODUCTIONS. For the record, this is (*insert case number*), entitled State of Ohio versus (*insert name of case*).

Appearing on behalf of the plaintiff is Attorney (*insert name of attorney*). Would you rise, please, and introduce yourself and your client to the jury?

Appearing on behalf of the defendant is Attorney (*insert name of attorney*). Would you rise, please, and introduce yourself and your client to the jury?

2. CLAIM(S). (*Insert brief synopsis of the complaint and answer*). I will explain the elements to you in more detail at a later time.

CV 203.03 Voir dire questions: sample instruction *[Rev. 1-22-11]*

COMMENT

This is one commonly used approach to voir dire. There are other acceptable approaches that the trial judge may wish to explore.

1. ADMINISTRATION OF OATH. If you would all please rise.

(*Oath to venire then administered by judge or clerk of courts.*)

Be seated, please.

2. JUDGE'S VOIR DIRE.

(A) ROLE OF A JUROR. I am now going to question the prospective jurors who are seated in the jury box concerning their qualifications to serve as jurors in this case. All members of this jury panel, however, should pay close attention to my questions, making mental note of the answers you would give if these questions were asked of you. If you are called to the jury box, you will be asked to give your answers to these or similar questions. I am sure that each of you is generally qualified to be a juror. However, there may be something that could disqualify you in this case. (*Direct the next sentence to prospective jurors seated in the jury box.*) In the trial of this case, each side is entitled to have a fair, unbiased, and unprejudiced jury. If there is any fact or any reason why any of you might be biased or prejudiced in any way, you must disclose such reason when you are asked to do so. It is your duty to make this disclosure. If this disclosure is of a personal nature, you have the option to make this disclosure in private to the court and counsel.

After my questions, the attorneys will ask you questions. These questions are not designed to pry into your personal affairs, but to discover whether you have any knowledge of this case; whether you have any pre-conceived opinion that you cannot set aside; or whether you have had any experience that might cause you to identify yourself with any party. These questions are necessary to ensure each party a fair and impartial jury. After the examination by the court and counsel, you may be excused. If you are excused, do not be offended and do not try to figure out why.

(B) JUDGE'S QUESTIONS TO JURY.

(1) Are any of you related by family or marriage, or do any of you have any personal acquaintance with or knowledge of, either directly or indirectly:

(a) the plaintiff: (*insert name of plaintiff*);

(b) the plaintiff's lawyers: (*insert name of plaintiff's lawyers*);

(c) the defendant: (*insert name of defendant*); or

(d) the defendant's lawyers: (*insert name of defendant's lawyers*)?

(2) The complaint in this case alleges that (*insert allegations included in the complaint*) and the answer alleges (*insert allegations included in the answer*). Do any of you have any prior knowledge of or information concerning the facts involved in this case?

(3) Do any of you have any personal interest of any kind in this case?

(4) During the trial of this case, the following persons may be called as witnesses to testify on behalf of the parties: (*insert name of witnesses*). Have any of you heard of or otherwise been acquainted with any of the witnesses just named? The parties are not required and might not wish to call all of these witnesses, and may later find it necessary to call other witnesses.

(5) Do any of you have any feeling, thought, inclination, premonition, prejudice,

or bias that might influence or interfere with your full and impartial consideration of the evidence that will be produced by the plaintiff and the defendant and that might influence you for or against either party?

(6) Are any of you related to or acquainted with each other? If so, will it create any problem if you serve on the same jury? Will it offend you if your relative or acquaintance is excused?

(7) How many of you have been involved personally in a lawsuit either as a party or a witness, or have had a relative or close friend as a party in a lawsuit? If so, would you describe the type of case?

(8) May I see the hands of those of you who have served as jurors in other cases? (*Direct the following questions to each person whose hand is raised.*)

(a) Would you tell us about the case or cases on which you served prior to today?

(b) Does your prior jury experience interfere in any way with your ability to be fair and impartial to each party in this case?

(c) (*If the prior jury experience was in a criminal case, the judge may wish to briefly discuss the difference in the burdens of proof.*) You must understand that there are substantial differences in the rules applicable to the trial of criminal cases from those applicable to the trial of civil cases. This is particularly true in respect to the burden of proof. In a civil case, the plaintiff must prove his/her case by a preponderance of the evidence. In a criminal case, the defendant is presumed to be innocent. Before he/she may be found guilty, the prosecution must prove his/her guilt beyond a reasonable doubt. Will each of you be able to set aside the instructions that you received in your previous cases and try this case on the instructions given by me?

(9) It is important that I have your assurance that you will, without reservation, follow my instructions and rulings on the law and will apply the law that I give you to this case. To put it somewhat differently, whether you approve or disapprove of the court's rulings or instructions, it is your solemn duty to accept as correct these statements of the law. You may not substitute your own idea of what you think the law is or ought to be. Will all of you follow the law as given to you by me in this case?

(10) (OPTIONAL). Will you be able to listen to the testimony of a police or other law enforcement officer and measure it by the same standards you use to test the credibility of any other witness?

(11) Do any of you, any member of your immediate family, or any close friends have a legal or medical background?

(12) Do you know of any other reason, or has anything occurred during this question period, that might make it difficult for you to be fair and impartial in this case?

(13) I expect this case to take (*insert number of days*) days. There may be some long hours involved or it may take longer than I expect. (*Advise prospective jurors of daily timeframes.*) You will all be given time to contact family and friends to change or modify plans you may have. Will this cause any added hardship you cannot reasonably overcome, or do you have any issues in your personal life that might divert your attention from this case?

3. ATTORNEYS' VOIR DIRE.

(A) (*At sidebar, the court can ask the attorneys whether there are additional questions they wish the court to ask of the jury.*)

(B) (*The trial judge must permit counsel to supplement the judge's examination of the prospective jurors. The scope of such additional questions or supplemental examination shall be within reasonable limits prescribed by the trial judge in his/her sound discretion. It is helpful to give counsel copies of rules on voir dire, suggestions provided in OJI-CV 301.01, section 4, that defines the scope of their supplemental examination.*)

4. CHALLENGES FOR CAUSE. (*The court should ask counsel for each party to exercise any challenges for cause that have not been agreed upon or have not been ordered by the court.*)

5. PEREMPTORY CHALLENGES. The next stage of voir dire involves peremptory challenges. Each side may excuse a limited number of jurors without giving any reason. (*At this point, the court calls on each side, alternately, to exercise any peremptory challenges*).

6. REPLACEMENT JURORS AFTER CHALLENGE. (*When a new prospective juror is seated, the court should ask him/her the following questions.*)

(A) Have you heard the questions by the court and counsel and the answers by the other prospective jurors?

(B) Is there anything that comes to mind as a result of those questions that you should bring to the court's attention or any reason why you cannot be a fair and impartial juror? (*It may be wise to revisit individual areas of inquiry to refresh the prospective juror's recollection.*)

(C) Can you think of any reason why you might not be able to listen to the evidence in this case fairly or why you should not be on this jury?

(D) (*The court should let counsel inquire of the replacement juror.*)

7. ALTERNATE JURORS. (*Depending on the anticipated length of the trial or type of case, the trial judge will determine the number of alternate jurors, up to a maximum of six, and select them one at a time.*)

8. ADMINISTER THE OATH TO THE JURY BY THE JUDGE OR DESIGNEE. Do you swear or affirm that you will diligently inquire into and carefully deliberate all matters between (*insert name of plaintiff*) and (*insert name of defendant*)? Do you

swear or affirm you will do this to the best of your skill and understanding, without bias or prejudice? (So help you God) (This you do as you shall answer under the pains and penalties of perjury). If so, say "I do (swear) (affirm)."

9. DISMISSAL OF REMAINING PANEL. (*At this point, excuse the remaining members of the venire and instruct them regarding future reporting requirements.*)

Chapter CV 205

PRELIMINARY INSTRUCTIONS: SAMPLE INSTRUCTIONS

CV 205.01 **Preliminary instructions: sample instruction** *[Rev. 10-23-10]*

CV 205.03 **Admonitions to the jury: sample instruction** *[Rev. 8-15-12]*

CV 205.05 **Recess instructions: sample instruction** *[Rev. 10-23-10]*

CV 205.01 Preliminary instructions: sample instruction *[Rev. 10-23-10]*

1. GENERAL. Before we hear the opening statements of counsel and begin to take evidence, I will give you preliminary instructions to follow as you listen to and consider the evidence in this case. Later, after you have heard all of the evidence and closing arguments of counsel, I will give you further instructions on the law that you are to follow in this case. It is my duty as judge to instruct you on the law, and it is your duty to follow the law as I give it to you.

2. EVALUATING THE EVIDENCE. First of all, it is your exclusive duty to decide all questions of fact submitted to you. In connection with this duty, you must decide the effect and value of the evidence. You must not be influenced in your decision by sympathy, prejudice, or passion toward any party, witness, or attorney in the case.

If, in these instructions or in instructions that I give you at the conclusion of the evidence, any principle or idea is repeated or stated in varying ways, no emphasis is intended and you must not infer any. Therefore, you must not single out any particular sentence or individual point or instruction and ignore the others. Rather, you are to consider all of the instructions as a whole, and you are to consider each instruction in relation to all the other instructions. The fact that I give you some of the instructions now and some at the conclusion of the evidence has no significance as to their relative importance, nor does the order in which I give them to you.

3. THE ATTORNEYS' ROLES. The attorneys for the parties will, of course, have active roles in the trial. They will make opening statements to you, question witnesses and make objections, and finally will argue the case as the last step before you hear my final instructions and commence your deliberations. Remember that attorneys are not witnesses, and because it is your duty to decide the case solely on the evidence that you see or hear in the trial, you must not consider as evidence any statement by any attorney made during the trial. There is an exception, and that is if the attorneys agree to any fact. Such agreement, stipulation, or admission of fact will be brought to your attention, and it will then be your duty to regard such fact as being conclusively proved without the necessity of further evidence on the fact.

4. OBJECTIONS. If a question is asked and an objection to the question is sustained,

you will not hear the answer. You must not speculate as to what the answer might have been or as to the reason for the objection. If an answer is given to a question and the Court grants a motion to strike the answer, you are to disregard completely such question and answer and not consider them for any purpose. A question in and of itself is not evidence, and you may consider the question only as it supplies meaning to the answer.

5. CREDIBILITY OF WITNESSES. As jurors, you have the sole and exclusive duty to decide the credibility of the witnesses who will testify in this case, which simply means that it is you who must decide whether to believe or disbelieve a particular witness. In making these decisions, you will apply the tests of truthfulness that you apply in your daily lives. These tests include the appearance of each witness on the stand; the witness' manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see, hear, and know the things about which he or she testified; the witness' accuracy of memory, frankness or lack of it, intelligence, interest, and bias, if any; together with all the facts and circumstances surrounding the testimony. When applying these tests you will assign to the testimony of each witness such weight as you deem proper. You are not required to believe the testimony of any witness simply because it was given under oath. You may believe or disbelieve all or any part of the testimony of any witness.

You are not required to believe the testimony of any witness simply because the testimony was given under oath. You may believe or disbelieve all or any part of the testimony of any witness.

6. WEIGHT OF TESTIMONY. You should not decide any issue of fact merely on the basis of the number of witnesses that testify on each side of such issue. Rather, the final test in judging evidence should be the force and weight of the evidence, regardless of the number of witnesses on each side. The testimony of one witness believed by you is sufficient to prove any fact. Also, discrepancies in a witness' testimony or between one witness' testimony and that of others, if there are any, does not necessarily mean that you should disbelieve the witness. People commonly forget facts or recollect them erroneously after the passage of time. You are certainly all aware of the fact that two people who are witnesses to an incident may often see or hear it differently. In considering a discrepancy in a witness' testimony, you should consider whether such discrepancy concerns an important fact or a trivial one.

7. OTHER TYPES OF EVIDENCE (OPTIONAL). During the course of the trial, certain testimony of an unavailable witness may be presented by deposition. A deposition is testimony that has been taken under oath before the trial by video or transcribed into written form for use at trial. Likewise, certain questions known as interrogatories and their answers may be read into evidence. An interrogatory is a question that one party asked another in writing before trial, the answer to which was given under oath in writing. You are to consider any questions and answers in depositions, and any interrogatories and their answers, as if they were presented live in the court.

8. CONCLUSION. This concludes my preliminary instructions. Please keep these

instructions in mind as you listen to the evidence and statements of counsel. I may give you additional instructions during the trial. When the presentation of the evidence and closing arguments have concluded, I will give you additional instructions on the law that you are to follow together with the instructions you have just heard and any instructions given during the trial.

CV 205.03 Admonitions to the jury: sample instruction *[Rev. 8-15-12]*

1. FAIR AND ATTENTIVE. It is important that you be fair and attentive throughout the trial. Do not discuss this case among yourselves or with anyone else. This includes family, friends, and the media. You must not post anything about this case on the Internet or on any electronic device including cell phones. This would include blogs and social networking sites such as MySpace, Facebook, Twitter, and others. Any such violation could lead to a mistrial and would severely compromise the parties' right to a fair trial. Do not permit anyone to discuss this case with you or in your presence. Do not form or express any opinion on this case until it is finally submitted to you.

2. AMONG YOURSELVES. You may not discuss this case among yourselves until it is finally submitted to you. You will receive the opening statements, the evidence, the closing arguments, and the law in that order. It would be unfair to discuss the case among yourselves before you receive everything necessary for your decision.

3. DO NOT DISCUSS OUTSIDE COURT. You should explain this rule prohibiting discussion of the case to your family and friends. When (the trial is over) (your jury duty is completed), I will release you from this prohibition. At that time, you may, but are not required to, discuss the case and your experiences as a juror.

4. REPORT VIOLATION. You are instructed not to talk with the attorneys, parties, or witnesses during the trial. Likewise, they must not talk with you. You must also not talk with anyone else about this case during the trial. If anyone should attempt to discuss the case with you, report the incident to me or to the bailiff immediately.

5. WARNING. Do not investigate or attempt to obtain additional information about this case from any source outside the courtroom. (This includes visiting the scene of the event or viewing pictures obtained on your own, including those obtained on the Internet, such as on Google Earth. This case involves the scene as it existed at the time of the event, not as it exists today. Viewing the scene, pictures, or other materials without the benefit of explanation in court is unfair to the parties who need you to decide this case solely upon the evidence that is admitted in this case.)

You are prohibited from performing your own experiments and conducting your own research, including Internet research. Such information may be incomplete, inaccurate, or irrelevant to the issues in this case. It is vital that you carefully follow these instructions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom.

6. NEWSPAPER, RADIO, AND TV. You must consider and decide this case only upon the evidence received at the trial. If you acquire any information from an outside source, you must report it to the bailiff immediately.

You are instructed not to read, view, or listen to any report in the newspaper or on the radio or television on the subject of this trial; do not permit anyone to read or comment upon them to you or in your presence. Media reports may be incomplete or inaccurate. You must consider and decide this case only upon the evidence received at the trial. If you acquire any information from an outside source, you must not report it to other jurors and you must disregard it in your deliberations. In addition, you must report the outside source of information to the bailiff or to the court at the first opportunity.

7. MEDIA DISTRACTION (OPTIONAL). These proceedings may be (broadcast) (photographed) (recorded) by members of the news media. You must not allow this fact to divert your attention from this case or to interfere with your duties as jurors. Further, you are not allowed to talk to members of the media during this trial.

8. VIOLATION. Any violation of these orders may require a new trial and may subject those involved to sanctions, including contempt of court.

9. PERSONAL PROBLEM. If, during the trial, issues arise that would affect your ability to pay attention and sit as a fair and impartial juror, you must explain the matter to the bailiff who will inform me. At any time if you cannot hear a witness, an attorney, or me, please make that fact known immediately by raising your hand.

10. RECESS. I will remind you of these instructions at each recess. If I forget to do so, however, they nevertheless apply to your conduct throughout the trial.

11. JURORS TAKING NOTES. OJI-CV 301.09.

12. JURORS ASKING QUESTIONS. OJI-CV 301.11.

13. INTERPRETERS AND TRANSLATORS. OJI-CV 301.13.

CV 205.05 Recess instructions: sample instruction *[Rev. 10-23-10]*

1. REQUIRED ADMONITION. Do not discuss this case among yourselves. Do not permit anyone to discuss it with you or in your presence. It is your duty not to form or express an opinion on the case until it is finally submitted to you.

2. REMINDER. Remember the admonitions the court previously gave you concerning your conduct.

Chapter CV 207

FINAL INSTRUCTIONS: SAMPLE INSTRUCTIONS

CV 207.01 Introduction: sample instruction *[Rev. 12-11-10]*

CV 207.03 Burden of proof: sample instruction *[Rev. 12-11-10]*

CV 207.05 Preponderance: sample instruction *[Rev. 12-11-10]*

CV 207.07 Evidence and inferences: sample instruction *[Rev. 8-17-11]*

CV 207.09 Evidence excludes: sample instruction *[Rev. 12-11-10]*

CV 207.11 Credibility: sample instruction *[Rev. 12-11-10]*

CV 207.13 Depositions: sample instruction *[Rev. 12-11-10]*

CV 207.15 Expert witness: sample instruction *[Rev. 12-11-10]*

CV 207.17 Case specific facts and law *[Rev. 12-11-10]*

CV 207.19 Proximate cause: sample instruction *[Rev. 12-11-10]*

CV 207.21 Personal (injury) (damage): sample instruction *[Rev. 12-11-10]*

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CV 207.25 Duty to mitigate: sample instruction *[Rev. 12-11-10]*

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CV 207.33 Introduction to deliberations: sample instruction *[Rev. 12-11-10]*

CV 207.35 Common closing remarks: sample instruction *[Rev. 2/1/20]*

CV 207.37 Questions by the jury: sample instruction *[Rev. 8/6/14]*

CV 207.39 Closing: sample instruction *[Rev. 12-11-10]*

CV 207.01 Introduction: sample instruction *[Rev. 12-11-10]*

Members of the jury, you have heard the evidence and the arguments of counsel. It is now the duty of the court to instruct you on the law that applies to this case. The court and jury have separate functions. You decide the disputed facts, and I give the instructions of law. It is your sworn duty to accept these instructions and to apply the law as I give it to you. You are not permitted to change the law nor to apply your own idea of what you think the law should be.

CV 207.03 Burden of proof: sample instruction *[Rev. 12-11-10]*

1. BURDEN OF PROOF. The person who claims that certain facts exist must prove them by a preponderance of the evidence. This duty is known as the burden of proof.

2. BURDEN ON PLAINTIFF. The burden of proof is on the plaintiff to prove the facts necessary for his/ her case by a preponderance of the evidence. (Later, the court will outline and explain the factual issues.)

CV 207.05 Preponderance: sample instruction *[Rev. 12-11-10]*

1. DEFINITION. Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. You must weigh the quality of the evidence. Quality may or may not be identical with (quantity) (the greater number of witnesses).

2. CONSIDER ALL EVIDENCE. In deciding whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence, regardless of who produced it.

3. EQUALLY BALANCED. If the weight of the evidence is equally balanced, the party who has the burden of proof has not established such issue by a preponderance of the evidence.

CV 207.07 Evidence and inferences: sample instruction *[Rev. 8-17-11]*

1. DEFINITION. Evidence is all the testimony received from the witnesses (including depositions) ([and] the exhibits admitted during the trial) (and any facts that the court requires you to accept as true).

2. VALUE OF EVIDENCE. You may consider both direct and circumstantial evidence. You must decide from all the direct and circumstantial evidence, taken together, whether the party who has the burden of proof has met that burden.

3. DIRECT EVIDENCE. Direct evidence is the testimony given by a witness who has seen or heard the facts about which the witness testifies. It includes exhibits admitted into evidence during the trial and stipulations that you were instructed to accept as fact.

4. CIRCUMSTANTIAL EVIDENCE. Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may reasonably infer other related or connected facts that naturally and logically follow according to the common experience of people.

5. INFERENCE. To infer, or to make an inference, is to reach a reasonable (conclusion) (deduction) of fact that you may, but are not required to, make from other facts that you find have been established by direct evidence. You may (infer a fact or facts) (reach a reasonable conclusion about a fact or facts) only from other (facts) (circumstances) that have been proved by the greater weight of the evidence. Whether an inference is made rests entirely with you.

6. WRITTEN STIPULATIONS OR AGREED EXHIBITS. The Court has admitted exhibits concerning certain evidence, and these will be with you during your deliberations.

CV 207.09 Evidence excludes: sample instruction *[Rev. 12-11-10]*

1. The evidence does not include the pleadings or any statement of counsel made during

the trial, unless such statement was an admission or agreement admitting certain facts. The opening statements and the closing arguments of counsel are designed to assist you. They are not evidence.

2. EVIDENCE STRICKEN. (Statements) (Answers) ordered stricken, or to which the court sustained an objection, or that you were instructed to disregard are not evidence and must be treated as though you never heard them.

3. OBJECTIONS AND SPECULATION. You must not guess why the court sustained the objection to any question or what the answer to such question might have been. You must not consider as evidence any suggestion included in a question that was not answered.

CV 207.11 Credibility: sample instruction *[Rev. 12-11-10]*

1. JUDGES OF THE FACTS. You are the judges of the facts, the (credibility) (believability) of the witnesses, and the weight of the evidence.

2. WEIGHT. To (weigh) (determine the greater weight of) the evidence, you must consider the (credibility) (believability) of the witnesses. You will use the tests of truthfulness that you use in your daily lives.

3. TESTS. These tests include the appearance of each witness upon the stand; the witness' manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see, hear, and know the things about which the witness testified; and the witness' accuracy of memory, frankness or lack of it, intelligence, interest, and bias, if any, together with all the facts and circumstances surrounding the testimony. Use these tests and assign to each witness' testimony such weight as you think proper.

4. ALL OR PART. You are not required to believe the testimony of any witness simply because the witness was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your duty to decide what testimony to believe and what testimony not to believe. The testimony of one witness if believed by you is sufficient to prove any disputed fact.

CV 207.13 Depositions: sample instruction *[Rev. 12-11-10]*

1. TESTIMONY. Some testimony was presented by (videotape) deposition. You are to consider this evidence according to the same tests that you apply to other testimony.

2. CREDIBILITY. If statements in a deposition differ from the testimony given by the same witness in the court room, you may consider the statements to test the (credibility) (believability) of such witness.

CV 207.15 Expert witness: sample instruction *[Rev. 12-11-10]*

1. GENERAL. Normally, a witness may not express an opinion. However, one who follows a profession may express an opinion because of that person's education, knowledge, and experience. Such testimony is admitted for whatever assistance it may provide to help you to arrive at a just verdict.

2. OPINION NOT BASED ON HYPOTHETICAL QUESTION. Questions have

been asked of the expert after the expert disclosed the underlying facts or data. It is for you, the jury, to decide whether such facts or data on which the expert based the opinions are true, and you will decide the weight to give such evidence.

3. WEIGHT OF EXPERT TESTIMONY. On you alone rests the duty of deciding what weight to give to the testimony of the expert. In deciding its weight, consider the expert's skill, experience, knowledge, veracity, and familiarity with the facts of this case, and the usual rules for testing (credibility) (believability) and deciding the weight to give to the testimony.

CV 207.17 Case specific facts and law *[Rev. 12-11-10]*

COMMENT

The following instructions are sample instructions for cases involving personal injury automobile accident in which negligence is not in dispute.

1. FACTS AND ISSUES NOT IN DISPUTE. Members of the jury, there are certain facts and issues not in dispute. Therefore, you are to accept the following as true:

(A) The defendant driver negligently caused a collision that (proximately) (directly) caused some (injury) (damage) to the plaintiff.

(B) The defendant is liable for any (injury) (damage) (proximately) (directly) caused to the plaintiff by the collision.

(C) The plaintiff is (*insert age of plaintiff*) years old and has a future average life expectancy of (*insert future average life expectancy*) years.

(D) As a (proximate) (direct) result of the collision, the plaintiff lost wages.

2. DISPUTED ISSUES. The disputed issues that you have to decide are as follows:

(A) What (injuries) (damages) were (proximately) (directly) caused to the plaintiff by the collision?

(B) What amount of money will reasonably compensate the plaintiff for the (injuries) (damages) (proximately) (directly) caused by the collision?

3. USE OF INSTRUCTIONS. To decide the disputed issues you will use the following instructions.

CV 207.19 Proximate cause: sample instruction *[Rev. 12-11-10]*

1. SEPARATE ISSUE. A party who seeks to recover for (injuries) (damages) must prove not only that the other party was negligent, but also that such negligence was a (proximate) (direct) cause of the (injuries) (damages).

2. DEFINED. (Proximate) (Direct) cause is an act or failure to act that in the natural and continuous sequence directly produced the (injury) (physical harm) and without which it would not have occurred.

3. SEVERAL CAUSES. There may be more than one (proximate) (direct) cause. When the negligent act or failure to act of one party (continues) (combines with) (joins) the negligence of another to produce the (injury) (damage), the negligence of each is a cause. It is not necessary that the negligence of each occur at the same (time) (place) or that there be a common purpose or action.

CV 207.21 Personal (injury) (damage): sample instruction *[Rev. 12-11-10]*

1. GENERAL. You will decide by the greater weight of the evidence an amount of money that will reasonably compensate the plaintiff for the actual (injury) (damage) (proximately) (directly) caused by the collision.

2. CONSIDERATION. In deciding this amount, you will consider the nature and extent of the (injury) (damage); the effect upon physical health; the pain and suffering experienced; the ability or inability to perform usual activities; and the reasonable cost of necessary medical and hospital expenses incurred. From these you will determine what sum will compensate the plaintiff for the (injury) (damage) to date.

3. PERMANENT INJURY AND EXPENSE. You will note that the plaintiff also claims that the injury is permanent and that he/she will experience pain and disability in the future. As to such claim(s), you may find no damage except that damage that will probably exist as a (proximate) (direct) result of the collision.

4. LOSS OF ABILITY TO PERFORM USUAL FUNCTIONS-PERMANENT DISABILITY. If you find from the greater weight of the evidence that, as a proximate cause of the injuries sustained, the plaintiff has suffered a permanent disability that is evidenced by way of the inability to perform the usual activities of life such as the basic mechanical body movements of walking, climbing stairs, feeding oneself, driving a car, [and so forth], or by way of the inability to perform the plaintiff's usual specific activities that had given pleasure to this particular plaintiff, you may consider, and make a separate award for, such damages.

Any amounts that you have determined will be awarded to the plaintiff for any element of damages shall not be considered again or added to any other element of damages. You shall be cautious in your consideration of the damages not to overlap or duplicate the amounts of your award that would result in double damages. For example, any amount of damages awarded to the plaintiff for pain and suffering must not be awarded again as an element of damages for the plaintiff's inability to perform usual activities. In like manner, any amount of damages awarded to the plaintiff for the inability to perform usual activities must not be considered again as an element of damages awarded for the plaintiff's pain and suffering, or any other element of damages.

5. SPECULATION. You are not to speculate regarding (permanent) (future) damages. The law deals in probabilities and not mere possibilities. In deciding (permanent) (future) damages, you may consider only those things that you find from the evidence are reasonably certain to continue.

6. REASONABLY CERTAIN. "Reasonably certain" means probable, that is, more

likely to occur than not.

CV 207.23 Mathematical formula: sample instruction *[Rev. 12-11-10]*

1. FORMULA AS ARGUMENT. You cannot consider as evidence the suggestion of counsel that you use a unit value or mathematical formula to compensate for pain and suffering or disability. There is no recognized unit value for pain and suffering or disability. Deciding compensation for pain and suffering or disability is solely your responsibility.

CV 207.25 Duty to mitigate: sample instruction *[Rev. 12-11-10]*

1. DUTY TO MITIGATE. The defendant claims the plaintiff failed to mitigate his/her damages. If the defendant proves by the greater weight of the evidence that the plaintiff did not (use reasonable diligence) (make reasonable efforts) under the facts and circumstances in evidence to (avoid loss) (lessen damages) caused by the defendant's negligence, you should not allow damages that could have been avoided by (the exercise of reasonable diligence) (reasonable efforts to avoid loss). The plaintiff, however, is not required to take measures that would involve undue risk, burden, or humiliation.

2. MEDICAL OR SURGICAL TREATMENT REASONABLY NECESSARY (ADDITIONAL). If the nature of the injury is such as to render medical or surgical treatment reasonably necessary, it is the duty of the person injured to use ordinary and reasonable diligence to secure the medical or surgical aid. In deciding whether a duty exists to undergo surgical treatment to correct a condition, you may consider the degree of risk involved to the plaintiff in such a procedure and the advice and recommendations of the plaintiff's treating doctor and/or surgeon.

CV 207.27 Quotient verdict: sample instruction *[Rev. 12-11-10]*

1. If you find for the plaintiff, you may not agree in advance to accept an average figure as the amount of your verdict. If a figure is reached by obtaining an average, such amount is not a proper verdict unless each juror thereafter individually exercises his or her judgment and decides whether he or she will accept such amount. At least six (6) members of the jury must individually accept the amount before it can be a fair and just verdict.

CV 207.29 Mortality table: sample instruction *[Rev. 12-11-10]*

1. PERMANENT INJURY. If you find that plaintiff's injury is permanent, you may consider how long the plaintiff is likely to live.

2. MORTALITY TABLE. The evidence of the life expectancy of people (*insert age of plaintiff*) years of age is an estimate of the average remaining length of life of all persons in this country based upon a limited number of persons of that age. It is an incomplete figure and does not indicate the future life-span of any individual. Such evidence is not conclusive; however, you may consider it along with all the other evidence.

CV 207.31 Present value of future damage; income taxes: sample instruction *[Rev. 12-11-10]*

1. PRESENT PECUNIARY VALUE. In the event you find for the plaintiff, the measure of any future damage is the present (loss in dollars) (pecuniary loss) that the plaintiff with reasonable certainty will sustain in the future and that is capable of measurement by the present value of money. You may not speculate upon any change in the value of the dollar.

2. INCOME TAXES. With reference to the amount of an award, if any, you are to follow the instructions already given. You may not consider federal, state, or city income taxes. In no event may you add to or subtract from an award because of such taxes.

CV 207.33 Introduction to deliberations: sample instruction *[Rev. 12-11-10]*

1. GENERAL. The court has given you the instructions on the law applicable to this case. I will now instruct you on how to conduct your deliberations and prepare your verdict(s).

2. SELECTION OF FOREPERSON. When you go to the jury room, your first function will be to select one of your number to serve as a foreperson. The person you select to preside over your deliberations does not have any greater power, nor does that person's vote have any more importance, than others. The foreperson serves the purpose of helping to conduct your deliberations in an orderly manner and to give each of you the opportunity to express your opinion. One additional duty of the foreperson is to see to it that the verdict form and any exhibits are returned to the court after you have reached a verdict.

3. VERDICT FORM(S). I will now read the verdict form(s).

4. REQUIRED NUMBER TO REACH VERDICT. In order to conclude this case, it is necessary that at least six (6) members of the jury agree upon the verdict. The members of the jury agreeing upon the verdict must sign their names in ink to the agreed-upon verdict form.

5. DELIBERATIONS AND VERDICT. You are warned not to discuss the status of your deliberations with anyone outside of the jury room nor are you to discuss your verdict with anyone other than your fellow jurors until it has been returned to the court.

6. VERDICT SIGNED. When you have reached and signed a verdict, you will summon the bailiff who will return you to the courtroom at which time your verdict will be announced.

CV 207.35 Common closing remarks: sample instruction *[Rev. 2/1/20]*

1. The court cannot embody all the law in any single part of these instructions. In considering one portion, you must consider it in light of and in harmony with all the instructions.

2. The court has instructed you on all the law necessary for your deliberations. Whether certain instructions are applicable may depend upon the conclusions you reach on the

facts by a greater weight of the evidence. If you have an impression that the court has indicated how any disputed fact should be decided, you must put aside such an impression because that decision must be made by you, based solely upon the facts presented to you in this courtroom.

3. JUDGE ASKING QUESTIONS (OPTIONAL). During trial, I asked some questions. You should not interpret any question by me as an indication of my opinion of the evidence, the facts, or the credibility of a witness. The fact that I asked a question does not mean the question was more important than any question asked by (an attorney) (a party).

COMMENT

Evid.R. 611, 614.

4. SYMPATHY. Circumstances in the case may arouse sympathy for one party or the other. Sympathy is a common human emotion. The law does not expect you to be free of such normal reactions. However, the law and your oath as jurors require you to disregard sympathy and not to permit it to influence your verdict.

5. JUST VERDICT. You must not be influenced by any consideration of sympathy or prejudice. It is your duty to weigh the evidence, to decide the disputed questions of fact, to apply the instructions of law to your findings, and to render your verdict accordingly. Your duty as jurors is to arrive at a fair and just verdict.

6. INITIAL CONDUCT. Your initial conduct upon commencing deliberations is important. It is not wise to express immediately a determination or to insist upon a certain verdict. Having so expressed yourself, your sense of pride may be aroused, and you may hesitate to give up your position even if shown that it is not correct.

7. INDIVIDUAL JUDGMENT. Consult with one another in the jury room, and deliberate with a view to reaching an agreement if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself. You should do so, however, only after a discussion of the case with the other jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should not surrender your considered opinions in order to be congenial or to reach a verdict solely because of the opinion of other jurors.

CV 207.37 Questions by the jury: sample instruction *[Rev. 8/6/14]*

1. JURY HAS A QUESTION. If you have a question, it should be discussed in the privacy of the jury room. It should be reduced to writing so that there will be no misunderstanding as to what is requested. It should not reflect the status of your deliberations.

2. UNDEFINED TERMS. Where a term has not been defined for you, you must give that term its common and ordinary meaning.

COMMENT

If, during deliberations, the jury requests a definition of a term or word in the

instructions that has not been defined, the trial judge and counsel should try to agree on a definition to provide to the jury.

CV 207.39 Closing: sample instruction *[Rev. 12-11-10]*

1. The Court will place in your possession the exhibits and the verdict form(s). The foreperson will retain possession of these records, including the verdict form(s), and return them to the courtroom. Until your verdict is announced in open court, you are not to disclose to anyone else the status of your deliberations or the nature of your verdict.

2. You will now retire. First, select a foreperson and whenever six (6) or more jurors agree upon the verdict, you will complete and sign the verdict in ink, and advise the bailiff. You will then be returned to the courtroom.

TITLE 3

GENERAL CIVIL TRIAL INSTRUCTIONS

Chapter CV 301 PRELIMINARY JURY MATTERS

Chapter CV 303 STANDARDS OF PROOF

Chapter CV 305 EVIDENCE AND CREDIBILITY

Chapter CV 309 INSTRUCTIONS DURING TRIAL

Chapter CV 311 INTRODUCTION OF SELECTED ISSUES

Chapter CV 313 CONCLUSIONS

Chapter CV 315 DAMAGES

Chapter CV 317 CLOSING INSTRUCTIONS

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Chapter CV 301

PRELIMINARY JURY MATTERS

CV 301.01 Before administering oath on voir dire *[Rev. 2/22/20]*

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CV 301.13 Interpreters and translators *[Rev. 8-15-12]*

CV 301.01 Before administering oath on voir dire *[Rev. 2/22/20]*

COMMENT

The judge may conduct the opening of voir dire in accordance with Civ.R. 47(A). By asking questions of a general nature of the panel as a group, considerable time can be saved. For example, rather than counsel asking each panel member one by one as to prior jury service, such a question addressed to the entire panel can promptly gain the desired result.

Prior to voir dire the court should inform counsel of the limits of inquiry.

Further economy in voir dire may be achieved by use of juror questionnaires and the Ohio Guide for Trial Jurors published by the Ohio Judicial Conference.

The following suggestions of rules for voir dire have been found to expedite the proceedings:

1) The case may not be argued in any way while questioning the jurors.

2) Counsel may not engage in efforts to indoctrinate jurors.

3) Jurors may not be questioned concerning anticipated instructions or theories of law. This does not prevent general questions concerning the validity and philosophy of reasonable doubt or the presumption of innocence.

4) Jurors may not be asked what kind of verdict they might return.

5) Questions are to be asked collectively of the entire panel whenever possible.

1. CIVIC DUTY REMARKS. Service as a juror is one of the most important and valuable civic duties that you can perform. Trial by jury is one of the most valuable rights that we possess in the United States. The preservation of this right is strengthened by your willingness to respond to the call for jury service. It is recognized that each of

you may be making some sacrifice by being present today. On behalf of the court and the community, I commend you and thank you for your service.

2. BEFORE ADMINISTERING OATH. As prospective jurors you will be placed under (oath) (affirmation) and counsel will question you to determine your ability to be fair and impartial in this case. These questions are not designed to pry into your personal affairs, but to discover if you have any knowledge of this case or any preconceived opinion that you cannot set aside, or if you have had any experience in your personal or family life that might cause you to favor a party. These questions are necessary to provide all parties with a fair jury. If the answer to a question contains information that you believe is important but would prefer not to discuss in the presence of the rest of the panel, arrangements will be made to accommodate you.

3. OATH ON VOIR DIRE. Do you solemnly (swear) (affirm) that the answers on your jury questionnaire are true and that you will truly and fully answer all questions asked by the court or counsel in this case and do you do this (as you shall answer unto God) (under penalty of perjury)? If so, please answer "yes."

COMMENT

Ohio Trial Court Jury Use and Management Standards, Standard 7 (August 16, 1993).

4. FAIR AND IMPARTIAL JURY. Each party is entitled to jurors who approach this case with open minds and agree to keep their minds open until a verdict is reached. Jurors must be as free as humanly possible from bias, prejudice, or sympathy, and not be influenced by preconceived ideas as to the facts or the law. You will receive the facts from the evidence admitted during the trial. Instructions of law will be given to you by the court, and it is your sworn duty to apply the instructions given to you. You may not substitute what you think the law is or should be.

5. IMPLICIT JUROR BIAS (OPTIONAL).

COMMENT

This instruction may be given at the discretion of the judge. A study in April 2014 by Jennifer K. Elek and Paula Hannaford-Agore for the National Center for State Courts concluded that the use of an implicit-bias instruction resulted in "no significant effects of the instruction on judgments of guilt, confidence, strength of the prosecution's evidence, or sentence length."

Our system of justice depends on jurors like you being able and willing to make careful and fair decisions. A first response is often like a reflex; it may be quick and automatic. Even though a quick response may not be the result of conscious thought, it may influence how we judge people or even how we remember or evaluate the evidence. You must not decide this case based upon personal likes or dislikes, generalizations, prejudices, sympathies, stereotypes, or biases. Take the time to reflect carefully and

consciously about the evidence. You must each reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.

COMMENT

Drawn from American Bar Association, *Achieving an Impartial Jury (AIJ) Toolbox*, http://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.authcheckdam.pdf (accessed Feb. 22, 2020).

CV 301.03 Qualifying the jury *[Rev. 1-22-11]*

1. WHY YOU ARE HERE. You have been summoned as prospective jurors in this case which concerns (*describe case*). I relate only this much information in order to determine whether any of you has previous knowledge of the case.

2. INTRODUCTION OF COUNSEL AND PARTIES.

COMMENT

It is appropriate after the introductions to ask the panel if any member is related, has had any business dealings with the person introduced, or any other general questions which would give rise to a challenge for cause. R.C. 2313.42, Civ.R. 47. See also, Revivor, OJI-CV 303.01.

3. VOIR DIRE BY COUNSEL. At this time, counsel are permitted to inquire of the panel. Counsel for the plaintiff(s) may inquire first followed by counsel for the defendant(s).

COMMENT

See Civ.R. 47.

(Text continued on page 51)

CV 301.05 Orientation for new jury *[Rev. 1-22-11]*

1. OATH.

COMMENT

There is no statutory oath for jurors in civil cases. R.C. 2315.01. For a sample, see OJI-CV 203.03 § 8.

2. TRIAL RULES. Jury service may be new to some of you, so a short explanation is in order. Those who participate in a law suit must do so in accordance with established rules. This applies to witnesses, lawyers, the judge, and jurors.

3. JUDGE AND COUNSEL. The lawyers present the evidence through questioning of witnesses which must be done according to rules. The judge enforces the rules and determines the admissibility of evidence. From time to time the court may sustain an objection to certain evidence. You will be instructed at such times to disregard that evidence, and you must not draw any inference from the question or speculate as to what the answer might have been.

4. JUDGES OF FACTS. You will be the judges of the facts, the (credibility) (believability) of the witnesses, and the weight to be given to the evidence. Later, the court will furnish the law and you will apply that law to the facts. It is your sworn duty to accept the law as it is given to you by the court.

5. TRIAL PROCEDURE. The procedure for the trial is as follows. First, counsel will outline in an opening statement what they expect their evidence will be. These opening statements are not evidence. They are a preview of the claims of each party designed to help you follow the evidence as it is presented. Then each side offers evidence to support its claim. The plaintiff proceeds first, followed by the defendant, and, thereafter, rebuttal evidence may be offered. The trial concludes with the arguments of counsel which, again, are not evidence, and the instructions of law by the court. You will then deliberate on your verdict.

COMMENT

See Civ.R. 51(B).

CV 301.07 Admonitions to the jury *[Rev. 8-15-12]*

1. FAIR AND ATTENTIVE. It is important that you be fair and attentive throughout the trial. Do not discuss this case among yourselves or with anyone else. This includes family, friends, and the media. You must not post anything about this case on the Internet or on any electronic device including cell phones. This would include blogs

and social networking sites such as MySpace, Facebook, Twitter, and others. Any such violation could lead to a mistrial and would severely compromise the parties' right to a fair trial. Do not permit anyone to discuss this case with you or in your presence. Do not form or express any opinion on this case until it is finally submitted to you.

2. AMONG YOURSELVES. You may not discuss this case among yourselves until it is finally submitted to you. You will receive the opening statements, the evidence, the closing arguments, and the law in that order. It would be unfair to discuss the case among yourselves before you receive everything necessary for your decision.

3. DO NOT DISCUSS OUTSIDE COURT. You should explain this rule prohibiting discussion of the case to your family and friends. When (the trial is over) (your jury duty is completed), I will release you from this prohibition. At that time, you may, but are not required to, discuss the case and your experiences as a juror.

4. REPORT VIOLATION. You are instructed not to talk with the attorneys, parties, or witnesses during the trial. Likewise, they must not talk with you. You must also not talk with anyone else about this case during the trial. If anyone should attempt to discuss the case with you, report the incident to me or to the bailiff immediately.

5. WARNING. Do not investigate or attempt to obtain additional information about this case from any source outside the courtroom. (This includes visiting the scene of the event or viewing pictures obtained on your own, including those obtained on the Internet, such as on Google Earth. This case involves the scene as it existed at the time of the event, not as it exists today. Viewing the scene, pictures, or other materials without the benefit of explanation in court is unfair to the parties who need you to decide this case solely upon the evidence that is admitted in this case.)

You are prohibited from performing your own experiments and conducting your own research, including Internet research. Such information may be incomplete, inaccurate, or irrelevant to the issues in this case. It is vital that you carefully follow these instructions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom.

6. NEWSPAPER, RADIO, AND TV. You must consider and decide this case only upon the evidence received at the trial. If you acquire any information from an outside source, you must report it to the bailiff immediately.

You are instructed not to read, view, or listen to any report in the newspaper or on the radio or television on the subject of this trial; do not permit anyone to read or comment upon them to you or in your presence. Media reports may be incomplete or inaccurate. You must consider and decide this case only upon the evidence received at the trial. If you acquire any information from an outside source, you must not report it to other jurors and you must disregard it in your deliberations. In addition, you must report the outside source of information to the bailiff or to the court at the first opportunity.

7. MEDIA DISTRACTION (OPTIONAL). These proceedings may be (broadcast) (photographed) (recorded) by members of the news media. You must not allow this fact to divert your attention from this case or to interfere with your duties as jurors.

Further, you are not allowed to talk to members of the media during this trial.

8. VIOLATION. Any violation of these orders may require a new trial and may subject those involved to sanctions, including contempt of court.

9. PERSONAL PROBLEM. If, during the trial, issues arise that would affect your ability to pay attention and sit as a fair and impartial juror, you must explain the matter to the bailiff who will inform me. At any time if you cannot hear a witness, an attorney, or me, please make that fact known immediately by raising your hand.

10. RECESS. I will remind you of these instructions at each recess. If I forget to do so, however, they nevertheless apply to your conduct throughout the trial.

11. JURORS TAKING NOTES. OJI-CV 301.09.

12. JURORS ASKING QUESTIONS. OJI-CV 301.11.

13. INTERPRETERS AND TRANSLATORS. OJI-CV 301.13.

CV 301.09 Jurors taking notes *[Rev. 1-22-11]*

COMMENT

See Civ. R. 47.

1. NOTE-TAKING PROHIBITED. The court will not permit (further) note-taking by the jurors. The taking of notes may distract you from the evidence while you are writing.

2. NOTE-TAKING PERMITTED. The court will permit those jurors who desire to take notes during the trial to do so. No juror is required to take notes; the taking of notes is entirely a matter of personal choice for each juror. The fact that the notes taken by a juror support his/her recollection in no way makes his/her memory more reliable than that of the jurors who do not take notes. Do not let the taking of notes divert your attention from what is being said or what is happening in the courtroom during the trial. Some persons believe that taking notes is not helpful because it may distract a person's attention and interfere with hearing all the evidence. All notes are confidential and for the consideration of the jury only. Each note-taker will leave his/her notes (on his/her chair) (with the bailiff) during all recesses and until deliberations begin. At that time, you will be allowed to take your notes to the jury room. All notes will be returned to the bailiff for destruction when the jury is discharged.

CV 301.11 Jurors asking questions *[Rev. 1-22-11]*

COMMENT

See Civ. R. 47.

The Committee believes that all juror questions (whether asked or not asked)

should be preserved and made a part of the record.

1. QUESTIONS PROHIBITED. You are not permitted to ask questions of witnesses. It is the responsibility of the lawyers to present all the evidence necessary for you to decide the issues in this case.

2. QUESTIONS PERMITTED: PRELIMINARY INSTRUCTION. You are permitted to submit questions for the witnesses to answer. You must submit your question(s) in writing. If you have a question, wait until the end of the questioning of the witness by the lawyers. When the lawyers' questioning is finished, I will ask whether you have any questions. If you do, raise your hand and you will be furnished with pen and paper so that you may write your question(s). You must not display or discuss your question(s) with other jurors.

The written questions will be delivered to me for consideration and I, after consultation with counsel, will decide whether the questions may be asked of the witness and in what form.

You should not draw any conclusions if your question is not asked.

CV 301.13 Interpreters and translators ***[Rev. 8-15-12]***

COMMENT

If an interpreter and/or translator will be used during the trial, the trial judge should give the following as part of the preliminary and final instructions.

1. USE OF INTERPRETER OR TRANSLATOR. During this trial, (an interpreter) (a translator) (may provide) (has provided) an interpretation or translation. (Interpreters) (Translators) must provide a complete and accurate (interpretation) (translation) without altering, omitting, or adding anything to what has been (spoken) (written) and without explaining the statements of the original (speaker) (writer). You are not permitted to make any assumptions about a (witness) (party) based upon the use of (an interpreter) (a translator). Do not allow the fact that the (testimony) (exhibit) was in a language other than English influence you in any way.

COMMENT

Drawn from the Code of Professional Conduct for Court Interpreters and Translators, Canon 2.

2. CONSIDERATION OF INTERPRETATION OR TRANSLATION. The evidence you are to consider is only that provided through the (interpreter[s]) (translator[s]). Although some of you may understand (*specify language*), you must disregard your

own (interpretation) (translation) because you are not permitted to disagree with the English (interpretation[s]) (translation[s]) that (will be) ([has] [have] been) provided to you. All jurors must consider the same evidence.

COMMENT

The Committee believes that "interpreter" includes sign language interpreters. *See* Sup.R. 80.

3. MULTIPLE INTERPRETATIONS OR TRANSLATIONS (ADDITIONAL). Because you have received multiple (interpretations) (translations) that disagree, it is your duty to decide which, if any, (interpretation) (translation) is accurate.

Chapter CV 303

STANDARDS OF PROOF

CV 303.01 Revivor *[Rev. 3-19-11]*

CV 303.03 Burden of proof *[Rev. 10-22-11]*

CV 303.05 Preponderance *[Rev. 12-11-10]*

CV 303.07 Clear and convincing *[Rev. 2/24/18]*

CV 303.01 Revivor *[Rev. 3-19-11]*

1. GENERAL. The (plaintiff) (defendant) in this case is an (executor) (administrator). He/she represents the estate of (*insert name of decedent*). Although (*insert name of decedent*) is dead, the (*describe the claim/claims*) survive(s) and continue(s) in the name of the (executor) (administrator).

2. The fact that (*insert name of decedent*) died (after this case was filed) (from a wholly unrelated cause) does not terminate this claim. The (executor) (administrator) has been appointed to take the place of (*insert name of decedent*).

COMMENT

Use only if death resulted from an unrelated cause. Modify section 2 of this instruction if any one of the claims is for the death or permanent injury of the decedent. This type of instruction is helpful to the jury if given at the earliest opportunity.

CV 303.03 Burden of proof *[Rev. 10-22-11]*

1. BURDEN OF PROOF. The person who claims that certain facts exist must prove them by a preponderance of the evidence. This duty is known as the burden of proof.

2. BURDEN ON PLAINTIFF. The burden of proof is on the plaintiff to prove the facts necessary for his/her/its case by a preponderance of the evidence. (Later, the court will outline and explain the factual issues.)

3. WITH COUNTERCLAIM (ADDITIONAL). In this case, there is both a complaint and a counterclaim. Thus, the burden is on each party to establish the material issues necessary for his/her/its claim(s) by a preponderance of the evidence. (Later, the court will outline and explain the factual issues.)

4. AFFIRMATIVE DEFENSE (ADDITIONAL). The defendant(s) claim(s) (*describe affirmative defense*). This is an affirmative defense. The burden of proving an

affirmative defense by a preponderance of the evidence is on the defendant(s).

COMMENT

The instruction on the burden of proof for an affirmative defense is normally given with the explanation of that issue.

Judges may give a burden of proof instruction at the beginning of trial. A burden of proof instruction must always be given at the conclusion of evidence as well. Civ.R. 51.

CV 303.05 Preponderance *[Rev. 12-11-10]*

1. DEFINITION. Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. You must weigh the quality of the evidence. Quality may or may not be identical with (quantity) (the greater number of witnesses).

2. CONSIDER ALL EVIDENCE. In deciding whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence, regardless of who produced it.

3. EQUALLY BALANCED. If the weight of the evidence is equally balanced, the party who has the burden of proof has not established such issue by a preponderance of the evidence.

CV 303.07 Clear and convincing *[Rev. 2/24/18]*

1. CLEAR AND CONVINCING. "Clear and convincing" means that the evidence must produce in your minds a firm belief or conviction about the (facts to be proved) (truth of the matter). It must be more than evidence that simply outweighs or overbalances the evidence opposed to it.

COMMENT

Drawn from *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176 (1987). *See also State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512.

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Chapter CV 305

EVIDENCE AND CREDIBILITY

CV 305.01 **Evidence and inferences** *[Rev. 8-17-11]*

CV 305.03 **Evidence excludes** *[Rev. 3-19-11]*

CV 305.05 **Credibility** *[Rev. 8-15-12]*

CV 305.01 Evidence and inferences *[Rev. 8-17-11]*

1. DEFINITION. Evidence is all the testimony received from the witnesses (including depositions) (and the exhibits admitted during the trial) (and any facts that the court requires you to accept as true).

2. VALUE OF EVIDENCE. You may consider both direct and circumstantial evidence. You must decide from all the direct and circumstantial evidence, taken together, whether the party who has the burden of proof has met that burden.

3. DIRECT EVIDENCE. Direct evidence is the testimony given by a witness who has seen or heard the facts about which the witness testifies. It includes exhibits admitted into evidence during the trial and stipulations that you were instructed to accept as fact.

4. CIRCUMSTANTIAL EVIDENCE. Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may reasonably infer other related or connected facts that naturally and logically follow according to the common experience of people.

COMMENT

It is a practice of some judges to give an example of this rule as may be appropriate.

5. INFERENCE. To infer, or to make an inference, is to reach a reasonable (conclusion) (deduction) of fact that you may, but are not required to, make from other facts that you find have been established by direct evidence. You may (infer a fact or facts) (reach a reasonable conclusion about a fact or facts) only from other (facts) (circumstances) that have been proved by the greater weight of the evidence. Whether an inference is made rests entirely with you.

6. STATISTICAL EVIDENCE (ADDITIONAL). Statistics have been offered as evidence in this case by (*insert name of party or parties*). Statistics are one form of evidence that you may consider in deciding (*describe issues or claims*). To determine

the usefulness and reliability of the statistics you should evaluate them as you do any other kind of evidence, and you may consider the manner in which they were compiled and all of the surrounding facts and circumstances. This evidence is admitted for whatever assistance it may provide to help you to arrive at a just verdict.

COMMENT

In criminal cases see *People v. Collins* (1968), 68 Cal.2d 319, 438 P.2d 33, which reversed a robbery conviction because the identification of the robbers was based on a mathematical probability.

7. WRITTEN STIPULATIONS OR AGREED EXHIBITS. The Court has admitted exhibits concerning certain evidence, and these will be with you during your deliberations.

COMMENT

In appropriation cases, counsel may reduce certain testimony to an agreed written stipulation. This will aid the jury in their deliberations.

8. RES IPSA LOQUITUR (ADDITIONAL). OJI-CV 401.33.

9. PRESUMPTIONS (ADDITIONAL). OJI-CV 309.01.

CV 305.03 Evidence excludes *[Rev. 3-19-11]*

1. EVIDENCE EXCLUDES. The evidence does not include the pleadings or any statement of counsel made during the trial, unless such statement is an admission or (agreement) (stipulation) admitting certain facts. The opening statements and the closing arguments of counsel are designed to assist you. They are not evidence.

COMMENT

Civ.R. 8(G) provides that pleadings shall not be read or submitted to the jury.

2. EVIDENCE STRICKEN. (Statements) (Answers) ordered stricken, or to which the court sustained an objection, or that you were instructed to disregard, are not evidence and must be treated as though you never heard them.

3. OBJECTIONS AND SPECULATION. You must not guess why the court sustained the objection to any question or what the answer to that question might have been. You must not consider as evidence any suggestion included in a question that was not answered.

4. IMPROPER QUESTIONS. OJI-CV 309.23.

5. VIEW OF THE PREMISES. OJI-CV 309.15.

CV 305.05 Credibility ***[Rev. 8-15-12]***

1. JUDGES OF THE FACTS. You are the judges of the facts, the (credibility) (believability) of the witnesses, and the weight of the evidence.

2. WEIGHT. To (weigh) (determine the greater weight of) the evidence, you must consider the (credibility) (believability) of the witnesses. You will use the tests of truthfulness that you use in your daily lives.

3. TESTS. These tests include the appearance of each witness upon the stand; the witness' manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see, hear, and know the things about which the witness testified; and the witness' accuracy of memory, frankness or lack of it, intelligence, interest, and bias, if any, together with all the facts and circumstances surrounding the testimony. Use these tests and assign to each witness' testimony such weight as you think proper.

4. ALL OR PART. You are not required to believe the testimony of any witness simply because the witness was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your duty to decide what testimony to believe and what testimony not to believe. The testimony of one witness if believed by you is sufficient to prove any disputed fact.

5. INTERPRETERS AND TRANSLATORS. OJI-CV 301.13.

Chapter CV 309

INSTRUCTIONS DURING TRIAL

CV 309.01 Presumptions *[Rev. 9/14/19]*

CV 309.03 Prima facie evidence *[Rev. 3-19-11]*

CV 309.05 Limited purpose evidence *[Rev. 2-24-07]*

CV 309.07 Depositions, transcripts and interrogatories *[Rev. 12-11-10]*

CV 309.09 Opinion of layman *[Rev. 1-22-11]*

CV 309.11 Expert witness and hypothetical question *[Rev. 12-11-10]*

CV 309.13 Recess instructions *[Rev. 3-19-11]*

CV 309.15 Jury view; before visiting the scene(s) *[Rev. 1-23-10]*

CV 309.17 Before conducting test, experiment, or demonstration *[Rev. 3-19-11]*

CV 309.19 When party may not testify *[Rev. 3-19-11]*

CV 309.21 Witnesses of questioned competence *[Rev. 3-19-11]*

CV 309.23 Improper questions *[Rev. 3-19-11]*

CV 309.25 Giving written requests to instruct

CV 309.01 Presumptions *[Rev. 9/14/19]*

COMMENT

The rule that a presumption disappears upon the introduction of sufficient countervailing evidence and that it then must not be submitted to the jury raises the question as to when, if ever, a presumption may be mentioned to the jury in a civil case. *See Hoyle v. DTJ Ents., Inc.*, 143 Ohio St.3d 197, 2015-Ohio-843 (if a party against whom a presumption operates "produces evidence that counterbalances the presumption or leaves the case in equipoise, then the presumption disappears and the case must be disposed of on the evidence presented, without reference to the presumption") (quotations, brackets, and ellipses omitted); *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 713 (6th Cir. 1975) (explaining that "a statutory presumption falls out of a case when the party against whom the presumption works meets his burden of offering evidence sufficient to justify a contrary finding" (quotations omitted)).

Evid.R. 301 provides in civil cases that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast."

Presumptions have multiple purposes. They may shift the burden of proceeding

or substitute for evidence and are frequently confused with inferences. A presumption requires a particular conclusion as a matter of law unless the presumption is rebutted, whereas an inference permits but does not require the trier of fact—with the aid of common experience and logic—to reach a conclusion from the existence of a particular fact.

1. PRESUMPTION—DEFINED. A presumption is accepting something as true until it is proven not true by the greater weight of the evidence. A presumption imposes on (*insert name of party against whom the presumption applies*) the burden of going forward with evidence to (rebut) (meet) the presumption, but does not shift the burden of proof for the (claim) (counterclaim) (affirmative defense) (*insert other*), which remains throughout the trial on (*insert name of other party*).

COMMENT

Drawn from Evid.R. 301 and *Forbes v. Midwest Air Charter Inc.*, 86 Ohio St.3d 83, 1999-Ohio-85.

In the absence of sufficient credible evidence rebutting a presumption in a civil case, that presumption should be enforced by the court and explained to the jury. *Hoyle v. DTJ Ents., Inc.*, 143 Ohio St.3d 197, 2015-Ohio-843 ("A presumption is a procedural device that courts resort to only in the absence of evidence by the party in whose favor the presumption would otherwise operate" (quotations and brackets omitted)); *Myocare Nursing Home, Inc. v. Fifth Third Bank*, 98 Ohio St.3d 545, 2003-Ohio-2287 ("where a rebuttable presumption exists, a party challenging the presumed fact must produce evidence of a nature that counterbalances the presumption or leaves the case in equipoise. Only upon the production of sufficient rebutting evidence does the presumption disappear").

2. PRESUMPTION – DISAPPEARS ONCE EVIDENCE HAS BEEN OFFERED TO REBUT IT.

COMMENT

Where sufficient credible evidence has been introduced, the presumption disappears and may not be submitted or argued to the jury. The Committee believes that the sufficiency of the evidence presented by a party challenging a presumed fact is usually a question for the jury, and an instruction on the presumption will therefore generally be appropriate even if the party against whom the presumption operates has presented some evidence to rebut it. *But see* 1980 Staff Note, Evid.R. 301 ("If rebutted, the jury is not instructed that a presumption existed"); *Rudisill v. Ford Motor Co.*, 709 F.3d 595, 606–07 (6th Cir. 2013) (explaining that although the question of whether a presumption has been rebutted is generally for the jury to decide, "not every case involves the weighing of evidence" and "sometimes the answer is clear as a matter of law"); *id.* at 607 ("whether the presumption-rebuttal issue may be decided as a matter of law is not susceptible to a single categorical

answer, but instead must be answered by reference to the evidence before the court in the particular case at hand").

The following instruction may be helpful if a presumption has been improperly mentioned to the jury. It should be given when the presumption is mentioned.

There is a presumption of law that (*describe applicable presumption*). This presumption does not apply in this case because evidence to the contrary was introduced on this issue. This presumption was merely a procedural device and, having served its purpose, you may not consider it in your deliberations. It has no value as evidence. You may not give it any weight or consider it for any purpose in reaching your verdict.

3. PRESUMPTION – EXAMPLES.

COMMENT

See Evid.R. 301 and Staff Note thereunder. For civil cases discussing presumptions, see *Johnson v. U.S. Title Agency, Inc.*, 8th Dist. Cuyahoga No. 103665, 2017-Ohio-2852 ("A rebuttable presumption is a presumption which is not conclusive and which may be contradicted by evidence" (quotations omitted)); *Horsley v. Essman*, 145 Ohio App.3d 438, 444, 2001-Ohio-2557 (4th Dist.) ("a rebuttable presumption does not carry forward as evidence once the opposing party has rebutted the presumed fact"); *In re DeCerbo*, 5 Ohio Misc.2d 11, 14 (Ct. Claims 1982) ("A presumption is a rule which the law makes on a given state of facts. A party against whom a presumption is involved removes its effect when rebutting evidence is produced of a character which leaves the evidence as a whole in such a state that it cannot reasonably be said that the presumption would prevail over the evidence offered to destroy it"); *Thompson v. Oberlanders Tree & Landscape Ltd.*, 3d Dist. Marion No. 9-15-44, 2016-Ohio-1147 ("self-congratulatory affidavits, where the defendants deny any intent to injure, standing alone are not sufficient to rebut the presumption in R.C. 2745.01(C)" that an employer did have an intent to injure if the employer deliberately removed an equipment safety guard or deliberately misrepresented a toxic or hazardous substance).

For examples of instructions in cases with presumptions, see OJI-CV 423.07 (owner present in car), OJI-CV 529.01(2) (Lemon Law), OJI-CV 537.05(3) (employer intentional tort), OJI-CV 705.03 and 705.05 (presumption of paternity), and OJI-CV 709.31 and 709.33 (cause of death).

4. INFERENCE. OJI-CV 305.01.

CV 309.03 Prima facie evidence *[Rev. 3-19-11]*

1. PRIMA FACIE EVIDENCE. (*Describe prima facie evidence*) is evidence of (*insert applicable facts*).

2. Prima facie evidence may be sufficient evidence to establish (*insert applicable*

(Text continued on page 63)

facts), unless contradicted or explained away by other evidence of equal or greater weight. You may consider prima facie evidence only to the extent that you find it (credible) (believable).

COMMENT

State v. Cummings (1971), 25 Ohio St.2d 219.

CV 309.05 Limited purpose evidence *[Rev. 2-24-07]*

COMMENT

The court will occasionally find it necessary to instruct the jury on the applicability of limited purpose evidence such as issues of character, prior conviction, and others of similar nature. Generally, it is preferable to give this instruction at the time the evidence is offered. Control of such issues is adequately defined in Ohio Evid.R. 607, 608, and 609.

1. CREDIBILITY– –CONVICTION– –OTHER ACTS.

2. KNOWLEDGE OF CONDITION. There is evidence of a former accident at (*insert location*). This evidence may be considered for the purpose of determining whether the (cause of the injury) (defect) (foreign substance) was a condition of which the defendant (owner) had (notice or) knowledge. This evidence may not be considered for any other purpose.

COMMENT

Cottman v. Federman Co. (1942), 71 Ohio App. 89.

3. SEATBELTS.

COMMENT

R.C. 4513.263, effective April 7, 2005, authorizes the trier of fact to diminish the recovery of compensatory damages that represent noneconomic loss as defined in R.C. 2307.011. In a tort action, such noneconomic damages that could have been recovered but for the plaintiff's failure to wear all of the available elements of a properly adjusted occupant restraining device may not be recoverable. In a jury case, the trial judge should give cautionary instructions at the time such evidence is admitted indicating that the evidence may not be considered in the determination of negligence or contributory negligence. The judge should give a

modified compensatory damages instruction that the jury may diminish the recovery of noneconomic damages that would not have occurred if a restraining device had been in use.

CV 309.07 Depositions, transcripts and interrogatories *[Rev. 12-11-10]*

1. TESTIMONY. Some testimony was presented by (videotape) deposition. You are to consider this evidence according to the same tests that you apply to other testimony.

2. CREDIBILITY. If statements in a deposition differ from the testimony given by the same witness in the court room, you may consider the statements to test the (credibility) (believability) of such witness.

3. USE OF ANSWERS TO INTERROGATORIES. Evidence has been introduced consisting of written questions and answers previously submitted to one of the parties. Such evidence is to be considered according to the usual tests that are applied to the witnesses. You may consider the fact that such questions were formally submitted and the answers made in writing.

COMMENT

Civ.R. 33(B) permits answers to be used to the extent permitted by the Rules of Evidence. The above instructions are not recommended for general use.

A written deposition may not be sent to the jury room. The same rule applies to other documents revealed by discovery.

CV 309.09 Opinion of layperson *[Rev. 1-22-11]*

1. Normally a witness may not express an opinion. However, a person who had an opportunity to observe is permitted to express an opinion as to (speed) (intoxication) (sanity) (*specify other subject*). In deciding the value of such opinion, you will consider the opportunity that the witness had to observe the facts and his/her knowledge of and experience with those facts. In addition, you will apply the usual rules for testing credibility and deciding the weight to be given to testimony.

COMMENT

See Evid.R. 701.

CV 309.11 Expert witness and hypothetical question *[Rev. 12-11-10]*

1. OPTIONAL. Normally, a witness may not express an opinion. However, one who follows a (profession) (special line of work) may express his (her) opinion because of

his (her) education, knowledge, and experience. Such testimony is admitted for whatever assistance it may provide to help you to arrive at a just verdict.

2. HYPOTHETICAL QUESTION. Questions have been asked in which (an) expert witness(es) was (were) permitted to assume that certain facts were true and to give an opinion based upon that assumption. You must decide whether the assumed facts on which the expert(s) based (his) (her) (their) opinions are true. If any assumed fact was not established by the greater weight of the evidence, you will decide the effect of that failure on the value of the opinion(s) of the expert(s).

3. OPINION NOT BASED ON HYPOTHETICAL QUESTION. Questions have been asked of the expert witness(es) after (he) (she) (they) had disclosed the underlying facts or data. It is for you, the jury, to decide if such facts or data on which (he) (she) (they) based (his) (her) (their) opinion(s) are true, and you will decide the weight to give such evidence.

4. WEIGHT OF EXPERT TESTIMONY. As with other witnesses, on you alone rests the duty of deciding what weight to give to the testimony of the expert(s). In deciding its weight, consider (his) (her) (their) skill, experience, knowledge, veracity, familiarity with the facts of this case, and the usual rules for testing (credibility) (believability) and deciding the weight to give to the testimony.

COMMENT

Evid.R. 703 is not as broad as Fed.R.Evid. 703. Counsel may often agree to follow the latter as being more practical and realistic.

CV 309.13 Recess instructions *[Rev. 3-19-11]*

1. REQUIRED ADMONITION. Do not discuss this case among yourselves. Do not permit anyone to discuss it with you or in your presence. It is your duty not to form or express an opinion on the case until it is finally submitted to you.

COMMENT

The Committee has described the admonition as "required" and it is the better practice to give the admonition at every recess. The admonition is required in criminal cases, R.C. 2945.34, but it is not error unless actual prejudice is shown, *State v. Cox* (1975), 42 Ohio St.2d 200; *Warner v. State* (1922), 104 Ohio St. 38.

2. REMINDER. Remember the admonitions the court previously gave you concerning your conduct.

CV 309.15 Jury view; before visiting the scene(s) *[Rev. 1-23-10]*

1. You are going to be taken to the premises or scene involved in this case. You will

be required to remain together under the supervision of the (bailiff) (other officer) until you (return to the courtroom) (are excused). Counsel and the parties may be present at the time, but they may not discuss this case or demonstrate anything relating to it. The (bailiff) (other officer) may point out certain things to you.

2. What you observe at the scene is not evidence, since conditions may have changed since the time of the events in this case. The evidence as to the physical appearance of the scene must come to you from the witness stand. The sole purpose of this viewing is to help you understand the evidence as it is presented during the trial.

COMMENT

The court may exercise discretion as to permitting or denying a jury view. This holding has appeared in a negligence case. *Lacy v. Uganda Investment Corp.* (1964), 7 Ohio App. 2d 237.

In appropriation cases, a view shall be ordered when demanded. R.C. 163.12.

CV 309.17 Before conducting test, experiment, or demonstration *[Rev. 3-19-11]*

1. Arrangements have been made to conduct a/an (test) (experiment) (demonstration) and to introduce exhibits in connection with the (test) (experiment) (demonstration). Observe the conditions under which the (test) (experiment) (demonstration) is made. The conditions existing for the (test) (experiment) (demonstration) may or may not duplicate the conditions and other circumstances that existed at the time of the incident; this is a question of fact that you must decide from the evidence. It is for you, also, to decide what weight you give to the (test) (experiment) (demonstration) and to what extent you apply it to the facts.

2. EXPERT WITNESS. OJI-CV 309.11.

CV 309.19 When party may not testify *[Rev. 3-19-11]*

COMMENT

This subject is adequately treated in *Ohio Rules of Evidence* and R.C. 2317.03.

CV 309.21 Witnesses of questioned competence *[Rev. 3-19-11]*

COMMENT

Evid.R. 601 provides that a child 10 years of age or over is competent to testify. If the witness is competent, instructions on the subject are not recommended. The separate hearing should be conducted by the court without participation or

interference of counsel. *State v. Wilson* (1952), 156 Ohio St. 525. A witness who is over 10 years of age when called to testify, but who was only 4 years of age at the time he/she witnessed things about which he/she is to testify, is not, as a matter of law, incompetent to testify. The capability of such witness must be determined as of the time the happenings were witnessed. *Huprich v. Paul W. Varga & Sons, Inc.* (1965), 3 Ohio St.2d 87.

Suggestions as to a separate examination of a child: How old are you? What is your name? Where do you live now? Where did you live (*insert applicable time*)? Where do you go to school now? Where did you go to school (*insert applicable time*)? What grade will you be in next year? Have you ever failed in any grade? When is your birthday? Do you know the difference between telling a lie and telling the truth? Should you tell lies or tell the truth? Is it right or wrong to tell lies? Do you know that this court can punish you if you tell a lie? Do you know what it means to hold up your hand and swear to tell the truth? Does it mean you are to tell the truth or tell a lie? Will you tell us the truth today?

R.C. 2317.30 provides that "[b]efore testifying, a witness shall be sworn to testify [to] the truth, the whole truth, and nothing but the truth."

CV 309.23 Improper questions *[Rev. 3-19-11]*

1. You must not draw any inference for or against (either) (any) party from questions that the court did not permit to be answered. The court alone rules on the admission of evidence. Because you do not know the answer to such questions, it would be improper for you to guess what the answers might have been.

2. You are not permitted to consider for any purpose questions that the court did not allow to be answered. You may consider only such evidence as the court admits and give it such weight and credibility as you think proper.

COMMENT

An additional instruction may be necessary when counsel repeatedly asks improper questions. If counsel continues to disregard the rulings, the trial judge should give a warning out of the hearing of the jury.

Continued unanswered questions may be prejudicial, especially if they contain innuendoes and inferences of fact.

State v. Dinsio (1964), 176 Ohio St. 460.

CV 309.25 Giving written requests to instruct

COMMENT

Civ.R. 51(A). At the close of the evidence, or at such earlier time during the trial

as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. *Copies of such requests shall be furnished to all other parties at the time of making such requests.* The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. The court need not reduce its instructions to writing.

A party may *not* assign as error the giving or the failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Chapter CV 311

INTRODUCTION OF SELECTED ISSUES

CV 311.01 Presentation of issues *[Rev. 10-22-11]*

CV 311.03 Multiple parties *[Rev. 10-22-11]*

CV 311.05 Submission of causation and/or damage only *[Rev. 10-22-11]*

CV 311.07 Counterclaim *[Rev. 10-22-11]*

CV 311.09 Violations of statute *[Rev. 10-22-11]*

CV 311.11 Negligence and causation; separate and distinct *[Rev. 10-22-11]*

CV 311.01 Presentation of issues *[Rev. 10-22-11]*

COMMENT

No recommendation is made for the arrangement of the instructions or for the time when the issues and specific law are outlined and explained. Published instructions follow a standard arrangement, as explained in the introduction. In practice, this arrangement will vary with each judge and with each case.

The suggestions in this chapter are guides that may be used for a limited number of situations. Because of individual methods and unlimited possibilities, no attempt is made to provide guides for combinations of issues that are required for affirmative defenses, counterclaims, cross-claims, multiple claims, and multiple parties.

1. Members of the jury, you have heard the evidence and the arguments of counsel. It is now the duty of the court to instruct you on the law that applies to this case. The court and jury have separate functions. You decide the disputed facts, and I give the instructions of law. It is your sworn duty to accept these instructions and to apply the law as I give it to you. You are not permitted to change the law or to apply your own idea of what you think the law should be.

2. WITHDRAW UNSUPPORTED ISSUES.

COMMENT

Issues on which no evidence is offered should be withdrawn from the

consideration of the jury. This is particularly necessary if these issues have been referred to by counsel.

3. FACTS AND ISSUES NOT DISPUTED. There are certain (facts) (issues) concerning this case that are not in dispute. You shall accept that (*describe facts and issues that are not in dispute*).

COMMENT

Time, place, and many operational factors are usually undisputed. The same is equally true of specific issues. These should be briefly identified, and the jury instructed to accept them as true.

4. OUTLINE DISPUTED ISSUES. This leaves for your decision the disputed issues that may be summarized as follows:

COMMENT

Pleadings should not be read by the court or counsel, and they should not be submitted to the jury. Civ.R. 8(G).

(A) NEGLIGENCE. (Was) (Were) the defendant(s) negligent in any respect? If so, was the negligence of the defendant(s) a proximate cause of any (injury) (damage) sustained by the plaintiff(s)?

(B) CONTRIBUTORY NEGLIGENCE. (Was) (Were) the plaintiff(s) negligent in any respect? If so, did the negligence of the plaintiff(s) contribute to proximately cause his/her/its/their own (injury) (damage), if any?

(C) WILFUL AND WANTON MISCONDUCT. Did the act(s) or failure(s) to act of the defendant(s) amount to willful or wanton misconduct? If so, was the misconduct of the defendant(s) the proximate cause of any (injury) (damage) sustained by the plaintiff(s)?

(D) ASSUMED RISK. Did the plaintiff(s) knowingly assume the risk of (injury) (damage)? If so, was the plaintiff's assumption of risk a proximate cause of his/her/its/their own (injury) (damage)?

5. DAMAGES. If you find these issues in favor of the plaintiff(s), what sum of money will fairly and reasonably compensate the plaintiff(s) for his/her/its/their (injury) (damage)?

CV 311.03 Multiple parties *[Rev. 10-22-11]*

1. PLAINTIFFS. The rights of the plaintiffs in this action are separate and distinct.

The claims are being tried together for convenience. You should decide each plaintiff's claim(s) as if it/they were asserted in a separate (action) (cause). The instructions apply to each plaintiff unless otherwise indicated.

2. DEFENDANTS. Each defendant is entitled to a fair and separate consideration of his/her/its own defense(s) and is not to be affected by your decision with respect to the other(s). The instructions apply to each defendant unless otherwise indicated.

CV 311.05 Submission of causation and/or damage only ***[Rev. 10-22-11]***

1. LIABILITY DIRECTED – ISSUE OF DAMAGE. You are instructed that the defendant(s) (was) (were) negligent and the negligence of the defendant(s) proximately caused some (injury) (damage). The issue you will decide is an amount that will compensate the plaintiff(s) for the (injury) (damage).

COMMENT

Include instruction on proximate cause and damages. OJI-CV Chapter 405, OJI-CV Chapter 315.

2. NEGLIGENCE DIRECTED – ISSUES OF CAUSATION AND DAMAGE. You are instructed that the defendant(s) (was) (were) negligent. The issues you will decide are: did the negligence of the defendant(s) proximately cause (injury) (damage) to the plaintiff(s), and, if you find it did, what is the amount of the (injury) (damage)?

CV 311.07 Counterclaim ***[Rev. 10-22-11]***

1. The defendant(s) claim(s) that the plaintiff(s) caused (injury) (damage) to the defendant(s). You must decide whether the plaintiff(s) were negligent and if so, whether such negligence proximately cause the (injury) (damage) to the defendant(s).

2. NEGLIGENCE CONCLUSIONS. OJI-CV Chapter 406.

CV 311.09 Violations of statute ***[Rev. 10-22-11]***

1. NEGLIGENCE PER SE. One who violates a (statute) (law) that imposes a (mandatory) (specific) duty is guilty of negligence as a matter of law (whether ordinary care was used or not).

2. NOT NEGLIGENCE PER SE. This (statute) (law) does not impose a specific duty. It merely states a rule of conduct. You will consider the standard of care required by the (statute) (law) and decide whether such party used the degree of care required.

COMMENT

The appropriate instruction should be used with the statute or ordinance to which it applies. For illustrations of the presentation of statutes involving negligence per se and those that do not, see OJI-CV Chapter 411.

CV 311.11 Negligence and causation; separate and distinct *[Rev. 10-22-11]*

1. NEGLIGENCE AND PROXIMATE CAUSE. Negligence and proximate cause are separate and distinct issues. The plaintiff must prove that the defendant's negligence proximately caused or contributed to cause the plaintiff's (injury) (damage). If you find that the defendant was negligent, you must also decide whether such negligence proximately caused the plaintiff's (injury) (damage).

COMMENT

If there is a counterclaim or an issue of comparative negligence, see OJI-CV Chapter 403.

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Chapter CV 313

CONCLUSIONS

CV 313.01 Conclusion – one plaintiff, one defendant *[Rev. 12/8/18]*

CV 313.03 Conclusion – two or more defendants *[Rev. 12/8/18]*

CV 313.05 Conclusion with affirmative defense *[Rev. 12/8/18]*

CV 313.01 Conclusion – one plaintiff, one defendant *[Rev. 12/8/18]*

If you find that the plaintiff proved each part of his/her/its claim(s) by (*insert applicable standard of proof*), then you must find for the plaintiff. You must then decide what damages, if any, were caused by the defendant's conduct. If you find that the plaintiff failed to prove any part of his/her/its claim(s) by (*insert applicable standard of proof*) (or that defendant proved by [*insert applicable standard of proof*] that [*insert applicable affirmative defense*]), then your verdict must be for the defendant.

COMMENT

See also OJI-CV 313.05.

CV 313.03 Conclusion – two or more defendants *[Rev. 12/8/18]*

1. TWO OR MORE DEFENDANTS. Because there are (*insert number of defendants*) defendants in this case, several alternatives are presented for your decision.

2. ONE OR MORE DEFENDANTS LIABLE. If you find that the plaintiff proved each part of his/her/its claim(s) by (*insert applicable standard of proof*) against one or more of the defendants, then your verdict must be for the plaintiff against that defendant or those defendants whose conduct caused the plaintiff's (injury) (damage). You must then decide the amount of (injury) (damage) caused by the conduct of that defendant or those defendants. Finally, you will answer the interrogatories about the proportionate share of liability among those defendants who caused the plaintiff's (injury) (damage) according to their relative degree of fault.

3. OTHER DEFENDANTS NOT LIABLE. Even if you find that the plaintiff proved each part of his/hers/its claim by (*insert applicable standard of proof*) against one or more of the defendants, and if you find that the plaintiff failed to prove each part of his/her/its claim by (*insert applicable standard of proof*) against any other defendant (or that any defendant proved by [*insert applicable standard of proof*] that *[insert applicable affirmative defense(s)]*), then your verdict must be for that defendant or those defendants.

4. NO DEFENDANT LIABLE. If you find that the plaintiff failed to prove his/her/its claim by (*insert applicable standard of proof*) against any defendant (or that all of the defendants proved by [*insert applicable standard of proof*] that *[insert applicable affirmative defense(s)]*), then your verdict must be for all of the defendants.

CV 313.05 Conclusion with affirmative defense *[Rev. 12/8/18]*

1. If you find the defendant has proven (*insert affirmative defense*) by the (*insert applicable burden of proof*), your verdict must be for the defendant.

2. If you find that the defendant has not proven (*insert affirmative defense*) by the (*insert applicable burden of proof*), your verdict must be for the plaintiff if the plaintiff proved his/her/its claim by the (*insert applicable burden of proof*).

COMMENT

See also subject specific conclusions, e.g., OJI-CV 406.

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Chapter CV 315

DAMAGES

CV 315.01 Personal injury: tort actions (claims arising before 4/9/03) *[Rev. 8/6/14]*

CV 315.01 Personal injury: tort actions (claims arising on and after 4/9/03 but before 4/7/05) *[Rev. 5/3/14]*

CV 315.01 Personal injury: tort actions (claims arising on and after 4/7/05) *[Rev. 8/6/14]*

CV 315.03 Consortium *[Rev. 12-10-11]*

CV 315.05 Mathematical formula *[Rev. 12-11-10]*

CV 315.07 Miscarriage; stillbirth *[Rev. 12-10-11]*

CV 315.09 Future damages; periodic payments in non-comparative negligence tort actions; one defendant (claims arising on and after 1/5/88) *[Rev. 5-6-06]*

CV 315.11 Future damages; periodic payments in comparative negligence tort actions; two defendants, interrogatories on comparative negligence required (claims arising on and after 1/5/88) *[Rev. 5-6-06]*

CV 315.13 Tort actions based on claims for future damages; cost of annuity *[Rev. 5-6-06]*

CV 315.15 Aggravation; acceleration *[Rev. 12-10-11]*

CV 315.17 Earnings *[Rev. 12-10-11]*

CV 315.19 Automobile; personal property *[Rev. 12-10-11]*

CV 315.21 Loss of use *[Rev. 12-10-11]*

CV 315.23 Personal property without market value *[Rev. 12-10-11]*

CV 315.25 Subrogation *[Rev. 1-21-12]*

CV 315.27 Recovery limited, no joinder - husband, wife *[Rev. 1-21-12]*

CV 315.31 Injury and expenses - joint trial of separate claims *[Rev. 1-21-12]*

CV 315.33 Multiple defendants *[Rev. 1-21-12]*

CV 315.35 Real estate *[Rev. 3-28-09]*

CV 315.37 Punitive damages: certain tort actions (claims arising on and after 4/7/05) *[Rev. 5/6/17]*

CV 315.39 Reasonableness of attorney fees *[Rev. 5-6-06]*

CV 315.41 Quotient verdict *[Rev. 12-11-10]*

CV 315.43 Mortality table *[Rev. 12-11-10]*

CV 315.45 Present value of future damage; income taxes *[Rev. 10/3/15]*

CV 315.49 Wrongful death, compensatory damages *[Rev. 1-21-12]*

CV 315.51 Duty to mitigate *[Rev. 12-11-10]*

CV 315.53 Nominal damages *[Rev. 1-21-12]*

CV 315.01 Personal injury: tort actions (claims arising before 4/9/03) *[Rev. 8/6/14]*

1. GENERAL. If you find for the plaintiff, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the plaintiff for the actual (injury) (damage) proximately caused by the negligence of the defendant.

2. CONSIDERATION. In deciding this amount, you will consider the nature and extent of the injury; the effect upon physical health; the pain and suffering experienced; the ability or inability to perform usual activities; and (the earnings that were lost) (the reasonable cost of necessary medical and hospital expenses incurred). From these you will determine what sum will compensate the plaintiff for the injury to date.

3. REASONABLE VALUE (ADDITIONAL). In determining the reasonable value of medical, hospital or other related care, treatment, services, products or accommodations, you shall consider all of the evidence submitted. Both the original bill and the amount accepted as full payment may be considered along with all other evidence to determine the reasonable value.

COMMENT

Drawn from *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362.

4. PERMANENT INJURY AND EXPENSE. You will note that the plaintiff also claims that the (injury is permanent) (plaintiff will incur future expense) (plaintiff will experience pain or disability in the future). As to such claim(s), no damage may be found except that which is reasonably certain to exist as a proximate result of the (injury) (collision).

5. COLLATERAL SOURCES: INSURANCE. In deciding damages, you must not consider whether either party had insurance. Any assumption that either party had or did not have insurance is not relevant and may be wrong. You must not add to or subtract from any award based upon any assumption regarding insurance. You must resolve all issues presented to you only on the evidence admitted and the law in these instructions.

6. LOSS OF ABILITY TO PERFORM USUAL FUNCTIONS: PERMANENT DISABILITY.

COMMENT

In *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St.3d 601, 608 (1992), the Court stated that the following instructions shall be given to the jury, "[i]n the appropriate case, where there have been allegations of an evidence adduced on the

(Text continued on page 85)

plaintiff's inability to perform usual activities, occasioned by the injuries received." The required instructions limit the appropriate case to one in which "the plaintiff has suffered a permanent disability."

"If you find from the greater weight of the evidence that, as a proximate cause of the injuries sustained, the plaintiff has suffered a permanent disability which is evidenced by way of the inability to perform the usual activities of life such as the basic mechanical body movements of walking, climbing stairs, feeding oneself, driving a car, [and so forth], or by way of the inability to perform the plaintiff's usual specific activities which had given pleasure to this particular plaintiff, you may consider, and make a separate award for, such damages."

"Any amounts that you have determined will be awarded to the plaintiff for any element of damages shall not be considered again or added to any other element of damages. You shall be cautious in your consideration of the damages not to overlap or duplicate the amounts of your award which would result in double damages. For example, any amount of damages awarded to the plaintiff for pain and suffering must not be awarded again as an element of damages for the plaintiff's inability to perform usual activities. In like manner, any amount of damages awarded to the plaintiff for the inability to perform usual activities must not be considered again as an element of damages awarded for the plaintiff's pain and suffering, or any other element of damages."

7. SPECULATION. Regarding (permanent) (future) damages, you are not to speculate. The law deals in probabilities and not mere possibilities. In determining (permanent) (future) damage, you may consider only those things that you find from the evidence are reasonably certain to continue.

COMMENT

Aggravation; acceleration, OJI-CV 315.15. Consortium, OJI-CV 315.03. Earnings, OJI-CV 315.17. Miscarriage; stillbirth, OJI-CV 315.07. Injury and expenses—joint trial of separate claims, OJI-CV 315.31.

8. REASONABLY CERTAIN. "Reasonably certain" means probable, that is, more likely to occur than not.

COMMENT

Drawn from *State v. Holt*, 17 Ohio St.2d 81 (1969).

CV 315.01 Personal injury: tort actions (claims arising before 4/9/03) *[Rev. 8/6/14]*

1. GENERAL. If you find for the plaintiff, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the plaintiff for the actual (injury) (damage) proximately caused by the negligence of the defendant.

2. CONSIDERATION. In deciding this amount, you will consider the nature and extent of the injury; the effect upon physical health; the pain and suffering experienced; the ability or inability to perform usual activities; and (the earnings that were lost) (the reasonable cost of necessary medical and hospital expenses incurred). From these you will determine what sum will compensate the plaintiff for the injury to date.

3. REASONABLE VALUE (ADDITIONAL). In determining the reasonable value of medical, hospital or other related care, treatment, services, products or accommodations, you shall consider all of the evidence submitted. Both the original bill and the amount accepted as full payment may be considered along with all other evidence to determine the reasonable value.

COMMENT

Drawn from *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362.

4. PERMANENT INJURY AND EXPENSE. You will note that the plaintiff also claims that the (injury is permanent) (plaintiff will incur future expense) (plaintiff will experience pain or disability in the future). As to such claim(s), no damage may be found except that which is reasonably certain to exist as a proximate result of the (injury) (collision).

5. COLLATERAL SOURCES: INSURANCE. In deciding damages, you must not consider whether either party had insurance. Any assumption that either party had or did not have insurance is not relevant and may be wrong. You must not add to or subtract from any award based upon any assumption regarding insurance. You must resolve all issues presented to you only on the evidence admitted and the law in these instructions.

6. LOSS OF ABILITY TO PERFORM USUAL FUNCTIONS: PERMANENT DISABILITY.

COMMENT

In *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St.3d 601, 608 (1992), the Court stated that the following instructions shall be given to the jury, "[i]n the appropriate case, where there have been allegations of an evidence adduced on the

(Text continued on page 85)

plaintiff's inability to perform usual activities, occasioned by the injuries received." The required instructions limit the appropriate case to one in which "the plaintiff has suffered a permanent disability."

"If you find from the greater weight of the evidence that, as a proximate cause of the injuries sustained, the plaintiff has suffered a permanent disability which is evidenced by way of the inability to perform the usual activities of life such as the basic mechanical body movements of walking, climbing stairs, feeding oneself, driving a car, [and so forth], or by way of the inability to perform the plaintiff's usual specific activities which had given pleasure to this particular plaintiff, you may consider, and make a separate award for, such damages."

"Any amounts that you have determined will be awarded to the plaintiff for any element of damages shall not be considered again or added to any other element of damages. You shall be cautious in your consideration of the damages not to overlap or duplicate the amounts of your award which would result in double damages. For example, any amount of damages awarded to the plaintiff for pain and suffering must not be awarded again as an element of damages for the plaintiff's inability to perform usual activities. In like manner, any amount of damages awarded to the plaintiff for the inability to perform usual activities must not be considered again as an element of damages awarded for the plaintiff's pain and suffering, or any other element of damages."

7. SPECULATION. Regarding (permanent) (future) damages, you are not to speculate. The law deals in probabilities and not mere possibilities. In determining (permanent) (future) damage, you may consider only those things that you find from the evidence are reasonably certain to continue.

COMMENT

Aggravation; acceleration, OJI-CV 315.15. Consortium, OJI-CV 315.03. Earnings, OJI-CV 315.17. Miscarriage; stillbirth, OJI-CV 315.07. Injury and expenses—joint trial of separate claims, OJI-CV 315.31.

8. REASONABLY CERTAIN. "Reasonably certain" means probable, that is, more likely to occur than not.

COMMENT

Drawn from *State v. Holt*, 17 Ohio St.2d 81 (1969).

CV 315.01 Personal injury: tort actions (claims arising on and after 4/9/03 but before 4/7/05) *[Rev. 5/3/14]*

COMMENT

Pursuant to S.B. 120, effective for claims that arise on and after 4/9/03, a "tort action" is defined as "a civil action for damages for injury, death, or loss to person or property" and includes a "product liability claim but does not include a civil action for damages for a breach of contract or another agreement between persons." R.C. 2307.011(K). Definitions relative to damages in a tort action that apply under S.B. 120 are superseded by enactment of S.B. 80, effective for claims that arise on and after 4/7/05. See OJI-CV 315.01 (on and after 4/07/05).

1. GENERAL. If you find for the plaintiff, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the plaintiff for the actual (injury) (loss) proximately and directly caused by the *(describe applicable tortious conduct)* of the defendant.

2. COMPENSATION. In deciding this amount, you will consider the plaintiff's "economic loss" and "noneconomic loss," if any, proximately and directly caused by the plaintiff's actual (injury) (loss).

3. ECONOMIC LOSS. "Economic loss" means any of the following types of financial harm:

(A) all wages, salaries, or other compensation lost as a result of the plaintiff's (injury) (loss);

(B) all expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of the plaintiff's (injury) (loss);

(C) all expenditures incurred by the plaintiff or of another person on behalf of the plaintiff to repair or replace the plaintiff's property that was injured or destroyed; and

(D) any other expenditure incurred as a result of the plaintiff's (injury) (loss).

COMMENT

Drawn from R.C. 2307.011(C) as enacted by S.B. 120, effective 4/9/03.

4. REASONABLE VALUE (ADDITIONAL). In determining the reasonable value of medical, hospital or other related care, treatment, services, products or accommodations you shall consider all of the evidence submitted. Both the original bill and the amount accepted as full payment may be considered along with all other evidence to determine the reasonable value.

COMMENT

Drawn from *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362.

5. COLLATERAL SOURCES: INSURANCE. In deciding damages, you must not consider whether either party had insurance. Any assumption that either party had or did not have insurance is not relevant and may be wrong. You must not add to or subtract from any award based upon any assumption regarding insurance. You must resolve all issues presented to you only on the evidence admitted and the law in these instructions.

6. NONECONOMIC LOSS. "Noneconomic loss" means harm other than economic loss that results from the plaintiff's (injury) (loss), including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; disfigurement; mental anguish; and any other intangible loss.

COMMENT

Drawn from R.C. 2307.011(F) as enacted by S.B. 120, effective 4/9/03.

7. PERMANENT INJURY AND EXPENSE. You will note that the plaintiff also claims (that the injury is permanent) (that the plaintiff will incur future expense) (that the plaintiff will experience pain or disability in the future). As to such claim(s), no damage may be found except that which is reasonably certain to exist as a proximate result of the (injury) (collision).

8. LOSS OF ABILITY TO PERFORM USUAL FUNCTIONS—PERMANENT DISABILITY.

COMMENT

In *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St.3d 601 (1992), the Court stated that the following instructions shall be given to the jury, "[i]n the appropriate case, where there have been allegations of an evidence adduced on the plaintiff's inability to perform usual activities, occasioned by the injuries received." The required instructions limit the appropriate case to one in which "the plaintiff has suffered a permanent disability."

"If you find from the greater weight of the evidence that, as a proximate cause of the injuries sustained, the plaintiff has suffered a permanent disability which is evidenced by way of the inability to perform the usual activities of life such as the basic mechanical body movements of walking, climbing stairs, feeding oneself, driving a car, [and so forth], or by way of the inability to perform the plaintiff's usual specific activities which had given pleasure to this particular plaintiff, you

may consider, and make a separate award for, such damages."

"Any amounts that you have determined will be awarded to the plaintiff for any element of damages shall not be considered again or added to any other element of damages. You shall be cautious in your consideration of the damages not to overlap or duplicate the amounts of your award which would result in double damages. For example, any amount of damages awarded to the plaintiff for pain and suffering must not be awarded again as an element of damages for the plaintiff's inability to perform usual activities. In like manner, any amount of damages awarded to the plaintiff for the inability to perform usual activities must not be considered again as an element of damages awarded for the plaintiff's pain and suffering, or any other element of damages."

9. SPECULATION. Regarding (permanent) (future) damages, you are not to speculate. The law deals in probabilities and not mere possibilities. In determining (permanent) (future) damages, you may consider only those things that you find from the evidence are reasonably certain to continue.

10. REASONABLY CERTAIN. "Reasonably certain" means probable, that is, more likely to occur than not.

COMMENT

Drawn from *State v. Holt*, 17 Ohio St.2d 81 (1969).

11. COMPARATIVE NEGLIGENCE INTERROGATORIES. OJI-CV 403.01 (on and after 4/9/03) OJI-CV 403.03 (on and after 4/9/03).

12. COMPARATIVE FAULT INTERROGATORIES. OJI-CV 403.05 (on and after 4/9/03), OJI-CV 403.07 (on and after 4/9/03).

13. GENERAL VERDICT.

CV 315.01 Personal injury: tort actions (claims arising on and after 4/7/05) *[Rev. 8/6/14]*

COMMENT

Pursuant to S.B. 80, effective for claims that arise on and after 04/07/05, a "tort action" is defined as "a civil action for damages for injury or loss to person or property." R.C. 2315.18(B). A "tort action" includes a civil action for a "product liability claim" as defined in R.C. 2307.71 and an "asbestos claim" as defined in R.C. 2307.91. "Tort action" does not include (1) claims for breach of contract or agreements; (2) medical, dental, optometric, and chiropractic claims; (3) claims brought in the Ohio Court of Claims; (4) claims brought under R.C. Chapter 2744 against political subdivisions of Ohio; and (5) wrongful death actions brought under R.C. Chapter 2125.

R.C. 4513.263, effective 04/07/05, authorizes the trier of fact to diminish the recovery of compensatory damages that represent noneconomic loss as defined in R.C. 2307.011. In a tort action, such noneconomic damages that could have been recovered but for the plaintiff's failure to wear all of the available elements of a properly adjusted occupant restraining device may not be recoverable. In a jury case, the trial judge should give cautionary instructions at the time such evidence is admitted indicating that the evidence may not be considered in the determination of negligence or contributory negligence. The judge should give a modified compensatory damages instruction that the jury may diminish the recovery of noneconomic damages that would not have occurred if a restraining device had been in use.

1. GENERAL. If you find for the plaintiff, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the plaintiff for the actual (injury) (loss) proximately and directly caused by the *(describe applicable tortious conduct)* of the defendant.

2. COMPENSATION. In deciding this amount, you will consider the plaintiff's "economic loss" and "noneconomic loss," if any, proximately and directly caused by the plaintiff's actual (injury) (loss).

3. ECONOMIC LOSS. "Economic loss" means any of the following types of financial harm:

(A) all wages, salaries, or other compensation lost as a result of the plaintiff's (injury) (loss);

(B) all expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of the plaintiff's (injury) (loss);

(C) all expenditures incurred by the plaintiff or by another person on behalf of the plaintiff to repair or replace the plaintiff's property that was injured or destroyed; and

(D) any other expenditure incurred as a result of the plaintiff's (injury) (loss) other than attorney's fees incurred by the plaintiff.

COMMENT

Drawn from R.C. 2315.18(A)(2) as enacted by S.B. 80, effective 04/07/05.

4. REASONABLE VALUE (ADDITIONAL). In deciding the reasonable value of medical, hospital, or other related care, treatment, services, products, or accommodations, you shall consider all of the evidence submitted. Both the original bill and the amount accepted as full payment may be considered along with all other evidence to decide the reasonable value.

COMMENT

Drawn from Robinson v. Bates, 112 Ohio St.3d 17, 2006-Ohio-6362.

In Jaques v. Manton, 125 Ohio St.3d 342, 2010-Ohio-1838, the Supreme Court of Ohio held that the enactment of R.C. 2315.20, effective 4/7/05, did not affect its prior ruling in *Robinson*.

5. INCOME TAXES. An award for (*describe type of damages*), if any, (is) (is not) subject to taxation under federal or state income tax laws. In no event may you add to or subtract from an award because of such taxes.

COMMENT

Some parts of an award to a claimant may be subject to federal and/or state income taxes. R.C. 2315.01(B) provides "[i]n all tort actions, the court shall instruct the jury regarding the extent to which an award of compensatory damages or punitive or exemplary damages is/is not subject to taxation under federal or state income tax laws." The Committee believes that the trial judge should include instructions to comply with the statute when income tax issues are relevant to an award.

Maus v. New York, Chicago & St. Louis Rd. Co., 165 Ohio St. 281 (1956), held that it was not error to reject a special instruction that required consideration of income taxes because such instruction encouraged the jury to "disregard the charge on the measure of damage." Although *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755 (1980), holds, as a matter of federal law, that the jury should be instructed in Federal Employer's Liability Act (FELA) cases to consider the effect of taxes in awarding damages, *Kaiser v. Ohio Bell Telephone Company*, 8th Dist. Cuyahoga No. 43056 (Aug. 27, 1981), recognizes *Liepelt* as limited to FELA cases. Accordingly, the above instruction has no general application and should be used only as an instruction to disregard improper evidence or argument, or in response to a jury question. *Accord Terveer v. Baschnagel*, 3 Ohio App.3d 312 (1982).

6. COLLATERAL SOURCES: INSURANCE. In deciding damages, you must not consider whether either party had insurance. Any assumption that either party had or did not have insurance is not relevant and may be wrong. You must not add to or subtract from any award based upon any assumption regarding insurance. You must resolve all issues presented to you only on the evidence admitted and the law in these instructions.

7. NONECONOMIC LOSS. "Noneconomic loss" means harm other than economic loss that results from the plaintiff's (injury) (loss), including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; disfigure-

ment; mental anguish; and any other intangible loss.

COMMENT

Drawn from R.C. 2315.18(A)(4) as enacted by S.B. 80, effective 04/07/05.

The Committee believes that the foregoing instructions abrogate the use of the permanent damages instruction found in Fantozzi v. Sandusky Cement Prod. Co., 64 Ohio St.3d 601 (1992).

In Arbino v. Johnson & Johnson, 116 Ohio St.3d 468, 2007-Ohio-6948, the Supreme Court of Ohio upheld the constitutionality of "caps" on noneconomic damages as provided in S.B. 180.

8. FUTURE OR PERMANENT INJURY AND LOSS (ADDITIONAL). The plaintiff also claims that the injury or loss (is permanent) (will continue into the future). As to such claims(s), no compensation or damages may be found except that which is reasonably certain to exist as a (proximate) (direct) result of the (injury) (loss). In deciding the amount of permanent (injury) (loss), you should follow the definitions of economic loss and noneconomic loss that I have previously given to you.

(If you decide to award compensatory damages for permanent [injury] [loss], you will further decide whether the [injury] [loss] involved

(Use appropriate alternative)

(A) permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;

(or)

(B) physical functional injury that permanently prevents the plaintiff from being able to independently care for himself/herself and perform life-sustaining activities.

COMMENT

Drawn from R.C. 2315.18(B)(4) as enacted by S.B. 80, effective 04/07/05.

R.C. 2315.18 places a limit of $250,000 on the amount of non-economic damages that may be recovered in a tort action. This limit may be exceeded only when the jury finds one of the two factors in (A) and (B) of the final sentence of paragraph 6 of this instruction, and the final sentence of paragraph 6 should only be given to the jury when the plaintiff seeks more than $250,000 in non-economic damages. After the jury determines the amount of non-economic damages, judgment may be entered in an amount greater than $250,000 only if the jury has found one of the two factors present; judgment may be entered in an amount of $250,000 or less in non-economic damages without regard to the two factors in paragraph 6 of the instruction.

9. CONSIDERATIONS IN DETERMINATION OF "NONECONOMIC LOSS". In determining an award for "noneconomic loss," you shall not consider any of the following:

(A) evidence of the defendant's alleged wrongdoing, misconduct, or guilt; and

(B) evidence of the defendant's wealth or financial resources; and

(C) all other evidence that is offered for the purpose of punishing the defendant, rather than offered for a compensatory purpose.

COMMENT

Drawn from R.C. 2315.18(C) as enacted by S.B. 80, effective 04/07/05.

10. CONSIDERATION OF THE PLAINTIFF'S BENEFITS. During the trial of this case, the defendant introduced evidence of amounts payable as a benefit to the plaintiff for the damages that result from the plaintiff's claim for (injury) (loss). In response, the plaintiff introduced evidence of amounts that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits addressed by the defendant's offering of evidence. You may consider this evidence in arriving at a just verdict.

COMMENT

In R.C. 2315.20(A), effective 04/07/05, evidence of collateral benefits is admissible on the defendant's initiative in "any tort action," which, with regard to this statute, the benefit applies to "claims for damages due to injury, death, or loss to person or property," including product liability claims and asbestos claims, and not including medical, dental, optometric, or chiropractic claims and not including claims for breach of contract or agreement. Such evidence of collateral benefits is inadmissible "if the source of the collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment . . . however, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action." R.C. 2315.20(A).

S.B. 80 further provides that "[a] source of collateral benefits of which evidence is introduced [by the defendant as described above] shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant." R.C. 2315.20(C). The Committee believes that this instruction is not intended to defeat a right of subrogation if the defendant introduces evidence of a benefit for which a subrogee has a contractual or statutory interest; rather, the Committee believes the intent of R.C. 2315.20(C) to declare that nonsubrogated interests are subject to admissibility under R.C. 2315.20(A).

Because the statutory language of S.B. 80 concerning the admissibility of evidence of a "collateral benefit" does not specify how the trier of fact is to

consider the evidence, the Committee believes it is unclear whether the "collateral benefits rule" as described in Pryor v. Webber, 23 Ohio St.2d 104 (1970), has been abrogated.

11. SPECULATION. Regarding (permanent) (future) damages, you are not to speculate. The law deals in probabilities and not mere possibilities. In deciding (permanent) (future) damages, you may consider only those things that you find from the evidence are reasonably certain to continue.

12. REASONABLY CERTAIN. "Reasonably certain" means probable, that is, more likely to occur than not.

COMMENT

Drawn from State v. Holt, 17 Ohio St.2d 81 (1969).

13. VERDICTS. If you find by the greater weight of the evidence that the plaintiff is entitled to recover, you will sign the general verdict form in favor of the plaintiff, and you will continue your deliberations and answer written questions called interrogatories about the plaintiff's damages.

14. NUMBER OF JURORS TO REACH DECISIONS. It is necessary that at least (six) (three-fourths) of the jurors agree on the answers to the interrogatories and on the general verdict. Those of you who agree will sign in ink the answers to the interrogatories and the general verdict.

15. INTERROGATORIES.

(A) The total compensatory damages recoverable by the plaintiff.

STATE YOUR ANSWER IN FIGURES IN INK. $_____

_____ _____

_____ _____

_____ _____

_____ _____

(B) The portion of total compensatory damages that represents damages for economic loss.

STATE YOUR ANSWER IN FIGURES IN INK. $_____

_____ _____

_____ _____

_____ _____

_____ _____

(C) The portion of total compensatory damages that represents damages for noneconomic loss.

STATE YOUR ANSWER IN FIGURES IN INK. $_____

_____ _____
_____ _____
_____ _____
_____ _____

(D) Do you find that the plaintiff sustained

(1) (permanent and substantial physical deformity) (loss of use of a limb) (loss of a bodily organ system)?

Yes _____ No _____
CHECK YOUR ANSWER IN INK.

_____ _____
_____ _____
_____ _____
_____ _____

(2) permanent physical functional injury that permanently prevents the plaintiff from being able to independently care for himself/herself and perform life-sustaining activities?

Yes _____ No _____
CHECK YOUR ANSWER IN INK.

_____ _____
_____ _____
_____ _____
_____ _____

16. GENERAL VERDICT. OJI-CV 403.01 § 4.

CV 315.03 Consortium *[Rev. 12-10-11]*

1. SPOUSE. If you find for (*insert name of plaintiff husband/wife*), you may award an amount that will reasonably compensate (*insert name of plaintiff husband/wife*) for damages that you find (resulted) (will result) from a loss of consortium.

COMMENT

Husband and wife have equal rights to consortium. *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 22 Ohio St.2d 65 (1970).

2. PARENT-CHILD; CHILD-PARENT. If you find for (*insert name of plaintiff parent/child*), you may award an amount that will reasonably compensate (*insert name of plaintiff parent/child*) for damages that you find (resulted) (will result) from a loss of (the child's) (parental) consortium.

COMMENT

A parent may recover for loss of a minor child's (filial) consortium. *Gallimore v. Children's Hosp. Med. Ctr.*, 67 Ohio St.3d 244, 1993-Ohio-205. Children, whether adults or minors, may recover for loss of parental consortium. *Rolf v. Tri State Motor Transit Co.*, 91 Ohio St.3d 380, 2001-Ohio-44.

3. CONSORTIUM. Consortium includes services, society, companionship, comfort, (sexual relations), love, and solace.

COMMENT

Drawn from *Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84 (1992).

CV 315.05 Mathematical formula *[Rev. 12-11-10]*

1. FORMULA AS ARGUMENT. You cannot consider as evidence the suggestion of counsel that you use a unit value or mathematical formula to compensate for pain and suffering or disability. There is no recognized unit value for pain and suffering or

(Text continued on page 95)

disability. Deciding compensation for pain and suffering or disability is solely your responsibility.

COMMENT

It is permissible for counsel in the opening portion of final argument to suggest a monetary amount and to apply the "mathematical formula" to illustrate the basis for the amount sought for pain and suffering, if the court instructs the jury that such argument and the amount assumed as the unit value are not evidence.

It is improper for counsel for the plaintiff to make such suggestion for the first time in the rebuttal portion of final argument. If first attempted in closing argument, counsel for the defendant must be granted time to "counter-argue." *Grossnickle v. Germantown* (1965), 3 Ohio St.2d 96. The Supreme Court did not explain why failure to discuss the subject in the opening portion of final argument constituted impropriety, and it did not suggest what other arguments might be similarly presented.

CV 315.07 Miscarriage; stillbirth *[Rev. 12-10-11]*

1. GENERAL. A woman who suffers a (miscarriage) (stillbirth) because of injuries negligently inflicted by another is entitled to recover damages that will reasonably compensate her for the physical and mental pain and suffering (and any permanent impairment of her health) resulting from the (miscarriage) (stillbirth) proximately caused by the negligence.

2. GRIEF. You cannot consider additional factors in your computation of damages. You cannot consider such items as grief for the loss of the child, including the loss of the society and enjoyment the child might have provided. (These damages should only be considered under the plaintiff's claim for wrongful death.)

COMMENT

Stidam v. Ashmore, 109 Ohio App. 431 (12th Dist. 1959), recognizes a cause of action for the wrongful death of a viable, unborn child. *See also* OJI-CV 315.47, OJI-CV 315.49.

The language included in parentheticals should only be given to the jury when there is a concurrent claim for wrongful death of the viable fetus.

CV 315.09 Future damages; periodic payments in non-comparative negligence tort actions; one defendant (claims arising on and after 1/5/88) *[Rev. 5-6-06]*

COMMENT

A jury may be required to answer interrogatories in trials of certain tort actions as defined in R.C. 2323.56(A)(6) and (H) based on claims arising and conduct occurring on and after January 5, 1988, and commenced on and after that date. R.C. 2323.56. If the plaintiff makes a good faith claim for future damages in excess of $200,000, the court must, on the motion of the plaintiff or the defendant in question, instruct the jury to return a general verdict, and if that verdict is for the plaintiff, to answer specific interrogatories. R.C. 2323.56 does not apply to (1) actions for other than injury to person, (2) tort actions against political subdivisions pursuant to R.C. Chapter 2744, (3) claims against the state in the Court of Claims, or (4) medical and allied claims as defined in R.C. 2305.113(E)(3), formerly R.C. 2305.11(D) (governed by R.C. 2323.55, formerly R.C. 2323.57).

For interrogatories on future damages in cases involving comparative negligence or cases involving more than one defendant, see OJI-CV 403.05 and OJI-CV 403.07.

The following instructions assume that the jury will have a form of general verdict separate from the interrogatories.

1. GENERAL. If you have decided by the greater weight of the evidence that the plaintiff is entitled to recover, you will answer written questions called interrogatories about damages.

2. NUMBER OF JURORS TO REACH DECISIONS. It is necessary that at least (six) (three-fourths) of the same jurors agree on the answers to the questions and on the general verdict. Those of you who agree will sign in ink the answers to the questions and the general verdict.

3. INTERROGATORIES.

(A) STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES, PAST AND FUTURE, SUFFERED BY THE PLAINTIFF.

STATE YOUR ANSWER IN INK $_____

_____ _____

_____ _____

_____ _____

_____ _____

Move to Interrogatory (B).

(B) WHAT PORTION OF YOUR ANSWER TO INTERROGATORY (A) IS

PAST DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF?

STATE YOUR ANSWER IN INK $_____

_____ _____

_____ _____

_____ _____

_____ _____

Move to Interrogatory (C).

(C) WHAT PORTION OF YOUR ANSWER TO INTERROGATORY (A) IS FUTURE DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF?

STATE YOUR ANSWER IN INK $_____

_____ _____

_____ _____

_____ _____

_____ _____

If you find that there are future damages, move to Interrogatory (D). If you find that there are no future damages, do not answer the remaining Interrogatories, complete the verdict form for the plaintiff, and report to the court that you have finished your deliberations.

(D) WHAT ARE THE PORTIONS OF THE FUTURE DAMAGES SHOWN IN YOUR ANSWER TO INTERROGATORY (C) THAT FALL INTO THE FOLLOWING:

(1) FUTURE ECONOMIC LOSS ..... $_____

(2) FUTURE NONECONOMIC LOSS ..... $_____

The total of these two amounts must equal your answer to Interrogatory (C).

_____ _____

_____ _____

_____ _____

_____ _____

Move to Interrogatory (E).

(E) WHAT ARE THE PORTIONS, IF ANY, OF FUTURE ECONOMIC LOSS SHOWN IN YOUR ANSWER TO INTERROGATORY (D)(1), IF ANY, THAT FALL INTO THE FOLLOWING:

(1) WAGES, SALARIES OR OTHER LOST COMPENSATION (EARNING CAPACITY) (FRINGE BENEFITS) ..... $_____

(2) (EXPENDITURES) (EXPENSES) (COSTS) FOR MEDICAL CARE OR TREATMENT, REHABILITATION SERVICES, OR OTHER CARE, TREAT-

MENT, SERVICES, PRODUCTS, OR
ACCOMMODATIONS ..... $_____

(3) ANY OTHER (EXPENDITURES) (EXPENSES)
(COSTS) ..... $_____

The total of future economic loss must equal your answer to Interrogatory (D)(1).

TOTAL ..... $_____

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

Drawn from R.C. 2323.56(B)(1).

4. PAST AND FUTURE DAMAGES. Damages that (result from) (are caused by) injury to the person are divided into past and future damages. "Past damages" are those that have accrued up to the time you reach your verdict. "Future damages" are those that are reasonably certain to occur after you reach your verdict.

COMMENT

Drawn from R.C. 2323.56(A)(2).

5. ECONOMIC LOSS. R.C. 2323.56(A)(1).

6. NONECONOMIC LOSS. R.C. 2323.56(A)(4).

7. FUTURE DAMAGES: COST OF ANNUITY (OPTIONAL). OJI-CV 315.13.

8. GENERAL VERDICT. OJI-CV 403.01 § 4 (claims arising before 1/5/88).

CV 315.11 Future damages; periodic payments in comparative negligence tort actions; two defendants, interrogatories on comparative negligence required (claims arising on and after 1/5/88) ***[Rev. 5-6-06]***

COMMENT

The instructions at OJI-CV 403.05 will serve in cases with two defendants, provided the terms referring to the defendant are pluralized. For an example of the

changes needed, compare OJI-CV 403.03 with OJI-CV 403.01. Note the long and short forms of Interrogatories, with and without vicarious liability of two defendants, at OJI-CV 403.03 §§ 3, 4, 5, and 6.

CV 315.13 Tort actions based on claims for future damages; cost of annuity *[Rev. 5-6-06]*

One method of determining the present value of future damages is the cost of an annuity. You have heard evidence about the cost of an annuity in connection with the award of future damages, if any. You may consider that evidence in making your decisions about the amount of future damages and give it such weight as you think proper.

COMMENT

R.C. 2317.62. See R.C. 2317.62(A)(3) for the definition of "tort action." The admission of annuity evidence must be consistent with the Rules of Evidence. An analogous provision applicable to wrongful death actions is found in R.C. 2125.02(A)(3)(b)(ii).

CV 315.15 Aggravation; acceleration *[Rev. 12-10-11]*

1. GENERAL. If you find for the plaintiff, you cannot consider any amount for a (pre-existing condition) (prior injury), nor for pain or expenses resulting solely from such (pre-existing condition) (prior injury). However, you will consider and decide an amount for whatever (aggravation) (acceleration) of injury, pain, or expenses you find were proximately caused by this (defendant) (collision). It is the extent of the (aggravation) (acceleration) for which the defendant is responsible.

COMMENT

If there is medical testimony that aggravation exists, the issue must be submitted to the jury even if the doctor testifies that it was impossible to state the amount or degree of aggravation. *Kantor v. McKinley*, 9 Ohio App.2d 243 (1966).

For submission of aggravation in a workers' compensation case, see OJI-CV 427.13, OJI-CV 427.15.

2. AGGRAVATION. "Aggravation" means that a physical condition, already existing, was made worse by this (defendant) (collision).

3. ACCELERATION. "Acceleration" means causing a condition to reach a point that it would have normally reached, but at a measurably earlier time. Where a defendant is not responsible for the pre-existing condition but only for the acceleration of that

condition, the defendant is only liable for the damages proximately caused by the acceleration.

CV 315.17 Earnings *[Rev. 12-10-11]*

1. PAST. You will consider whatever loss of earnings the evidence shows that the plaintiff sustained as a proximate result of the injury. (You will not award as damages for loss of earnings an amount more than *[insert dollar amount]*.)

2. FUTURE. You will also consider whatever loss (if any) of earnings the plaintiff will, with reasonable certainty, sustain in the future as a proximate cause of the injury. The measure of such damage is what the evidence shows with reasonable certainty to be the difference between the amount he was capable of earning before he was injured and the amount he is capable of earning in the future in his injured condition.

3. SPECULATION. OJI-CV 315.01 § 5.

CV 315.19 Automobile; personal property *[Rev. 12-10-11]*

1. MEASURE OF DAMAGE. If you find for the plaintiff, you will determine an amount of money that will reasonably compensate the plaintiff for the (damage to) (loss of) the (vehicle) (property). The measure of damage which you apply is the difference in the fair market value of the (vehicle) (property) immediately before, and immediately after, the collision.

2. REPAIRS. You may consider the reasonable cost of necessary repairs as evidence of the reduction in fair market value. The measure of damage, however, is the difference in the fair market value of the (vehicle) (property) immediately before and after the accident.

COMMENT

Falter v. Toledo, 169 Ohio St. 238 (1959).

Wooster Feed Mfg. Co. v. Village of Tallmadge, 82 Ohio App. 499 (1948):

> Proof of reasonable cost of repairs alone makes a prima facie case and is sufficient to carry the case to a jury on a question of damages.
>
> In the absence of other evidence, reasonably tending to prove that the vehicle had a greater market value after the repairs than before the accident, or that the cost of repairs exceeded the value of the vehicle as it was before the injury, evidence of the reasonable cost of repairs is sufficient to sustain a judgment in amount equal to such reasonable cost.

(Case involved the lack of any evidence whatsoever of before and after fair market value.)

3. FAIR MARKET VALUE. The fair market value is the price the (vehicle) (property) would bring if offered for sale in the open market by an owner who desired

to sell it, but was under no necessity or compulsion to do so, and when purchased by a buyer who desired to buy it, but was under no necessity or compulsion to do so—each having knowledge of the pertinent facts concerning such (vehicle) (property).

COMMENT

Bishop v. East Ohio Gas Co., 143 Ohio St. 541 (1944).

4. PERSONAL PROPERTY WITHOUT MARKET VALUE. OJI-CV 315.23.

COMMENT

It is sometimes useful to require the value of property damage to be set out separately in the verdict or to submit a special finding in those cases where other parties have some interest in the special element of damage. OJI-CV 315.25. This avoids problems under certain insurance policies and assists in the distribution of the proceeds.

CV 315.21 Loss of use *[Rev. 12-10-11]*

1. GENERAL. Plaintiff claims that he/she suffered further damage in the sum of (*insert amount*) by reason of being deprived of the use of the (automobile) (property) for a period of (*insert number of days*) days.

2. NO RENTAL. If you find for the plaintiff, you will consider as an element of damage the reasonable value of the use of the (automobile) (property) during the period reasonably necessary for making repairs or restoring it to a usable condition.

COMMENT

Insley v. Mitchell, 118 Ohio App. 104 (1963).

3. RENTAL. If you find for the plaintiff, you will consider as an element of damage the reasonable cost of the rental of a substitute (automobile) (property) during the period reasonably necessary to repair the damage.

CV 315.23 Personal property without market value *[Rev. 12-10-11]*

1. GENERAL. If you find for the plaintiff, the measure of damage is the reasonable value of the property to the owner.

2. TOTAL DESTRUCTION. If property for personal use is destroyed, the measure

of damage is the reasonable value to the owner. This does not necessarily mean the market value, because property of a strictly personal nature may have a nominal market value if sold as used property, but would have a higher reasonable value to the owner. In arriving at an amount, you may consider the original cost; the cost to replace such property less reasonable depreciation for its condition and use; the uses which the plaintiff has for the property; and other facts in the evidence. But the test you will apply is the reasonable value of the article to the owner at the time.

COMMENT

Erie Rd. Co. v. Steinberg, 94 Ohio St. 189 (1916); *Layton v. Ferguson Moving and Storage Co.*, 109 Ohio App. 541 (1959); *Bishop v. East Ohio Gas Co.*, 143 Ohio St. 541 (1944).

3. NOT TOTALLY DESTROYED. If an article is not totally destroyed, the measure of damage is the cost of repair to restore it to the condition it was in before it was damaged, provided the repairs do not exceed the reasonable value of the article to the owner. If repairs to the article will not restore its value, or if the cost of repairs exceeds its reasonable value to the owner, the measure of damage is the difference in reasonable value of the article to the owner immediately before and immediately after it was damaged.

4. PERSONAL PROPERTY WITH MARKET VALUE. OJI-CV 315.19.

CV 315.25 Subrogation *[Rev. 1-21-12]*

COMMENT

The Committee has eliminated the pattern instruction on subrogation. Where a subrogation issue exists, the trial judge will have to prepare a charge that addresses the particular subrogation issue.

CV 315.27 Recovery limited, no joinder – husband, wife *[Rev. 1-21-12]*

1. MARRIED PERSON OR CHILD – EXPENSES EXCLUDED. In this case you cannot consider any amount for hospital, medical, or other expenses for the care and treatment of the injury. These items are the legal responsibility of the (husband) (wife) (father) (mother) of the plaintiff.

2. MARRIED PERSON – EXPENSES INCLUDED. A (husband) (wife) is responsible for providing necessary care for his/her spouse and may recover for the cost of such expenses in an action on his/her own behalf. If the (husband) (wife) proves by the greater weight of the evidence that he/she specifically contracted in his/her own name

and became personally liable for such (hospital) (medical) expenses, however, he/she may recover the cost of the expenses.

COMMENT

Drawn from R.C. 3103.03.

3. MEDICAL EXPENSES ONLY. You cannot consider any amount of damage for the injury itself or for the pain and suffering experienced by the (husband) (wife) (child). These items are not involved in this case, which is an action by the (husband) (wife) (father) (mother) to recover for the medical, hospital, and other expenses that are his/her legal responsibility.

CV 315.31 Injury and expenses – joint trial of separate claims *[Rev. 1-21-12]*

1. MULTIPLE PLAINTIFFS. If you find for the plaintiffs, you will separately decide by the greater weight of the evidence an amount of money that will reasonably compensate each plaintiff for the actual (injury) (loss) proximately caused by the negligence of the defendant(s). As to each plaintiff, you will consider the nature and extent of the injury; the effect upon his/her physical health; the pain that he/she experienced; his/her ability or inability to perform usual activities; and (the earnings that he/she lost) (the reasonable cost of necessary medical and hospital expenses he/she incurred). From these you will decide what sum will compensate that plaintiff for the injury to date.

2. PERMANENT. OJI-CV 315.01.

3. MEDICAL EXPENSES. As to (*insert name of [spouse] [parent] [guardian]*), in deciding an amount, you will take into consideration the reasonable cost of all necessary medical (and hospital) expenses incurred by him/her to date for the care and treatment of his/her (spouse) (child) (ward).

CV 315.33 Multiple defendants *[Rev. 1-21-12]*

1. ONE RECOVERY. A party may bring an action and obtain a judgment against more than one defendant for his/her damage. Irrespective of the number of defendants, the plaintiff may only receive full compensation once for the same injury.

2. CONCURRENT NEGLIGENCE. OJI-CV 401.39.

CV 315.35 Real estate *[Rev. 3-28-09]*

1. If you find for the plaintiff, you will determine from a preponderance of the evidence the amount of money that will reasonably compensate the plaintiff for the actual damage to the property.

2. PERMANENT. When real property has been permanently or irreparably damaged, the measure of damage is the difference in the fair market value of the whole

property, including improvements thereon, immediately before and immediately after the damage occurred.

3. FAIR MARKET VALUE. The fair market value of real property is the price it would bring if offered for sale in the open market by an owner who desired to sell it, but was under no necessity or compulsion to do so, and when purchased by a buyer who desired to buy it, but was under no necessity or compulsion to do so—both parties being aware of the pertinent facts concerning the property.

4. TEMPORARY. If the damage to the property is temporary and such that the property can be restored to its original condition, then the owner may recover the

(Text continued on page 105)

reasonable cost of these necessary repairs. (Evidence of the diminution of the fair market value of the property caused by the damage may be considered in deciding the reasonableness of the cost of repairs.) (If, however, the property is commercial and these repair costs exceed the difference in the fair market value of the property immediately before and after the damage, then this difference in value is all that the owner may recover.)

COMMENT

Martin v. Design Const., 2009-Ohio-1; *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238.

CV 315.37 Punitive damages: certain tort actions (claims arising on and after 4/7/05) *[Rev. 5/6/17]*

COMMENT

Under R.C. 2315.21(B), effective 4/7/05, in a state-law tort action where the plaintiff seeks both compensatory and punitive damages, on the motion of any party, the court shall bifurcate the trial into two stages. If the jury finds that the plaintiff is entitled to an award of compensatory damages, the trial will enter the second stage. In the second stage, the jury will consider evidence that relates to the plaintiff's claim for punitive damages and determine whether the plaintiff is entitled to an award of punitive damages and the amount of those damages.

If the jury returns a verdict that awards punitive damages to the plaintiff, the court shall enter judgment on the punitive damages verdict based on the restrictions and limitations imposed by R.C. 2315.21(D). Pursuant to R.C. 2315.21(F), the trial court, trial counsel, and witnesses are prohibited from disclosing the statutory limitations on punitive damages to the jury.

Note that R.C. 2315.21(D)(6) removes the caps if the defendant is found to be acting with one or more of the culpable mental states of purposely and knowingly as described in R.C. 2901.22 and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly as described in that section, and that is the basis of the tort action. If this section is applicable, the court will have to draft additional interrogatories for the jury to answer.

See R.C. 2307.80 for punitive damages in product liability claims.

The supreme courts of the United States and Ohio addressed the constitutionality of punitive damages in *Gore v. BMW of North America, Inc.*, 517 U.S. 559 (1996), *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, and *Barnes v. University Hospitals of Cleveland*, 119 Ohio St.3d 173, 2008-Ohio-3344. The Supreme Court of Ohio in *Barnes* held that a court

reviewing an award of punitive damages must independently analyze three factors to determine whether the award is constitutional: (1) the degree of reprehensibility of the party's conduct; (2) the ratio of punitive damages to the actual harm inflicted; and (3) the difference between the award and civil sanctions authorized for similar misconduct. The factors controlling an award of punitive damages apply to post-verdict review by trial and appellate courts and should not be included in jury instructions.

1. GENERAL. Because you found that the plaintiff is entitled to compensatory damages against the defendant, you must now consider whether you will separately award punitive damages.

COMMENT

If the issue of punitive damages is not bifurcated, the instruction must be tailored accordingly. The Ohio Supreme Court has held that R.C. 2315.21(B) creates a substantive right to bifurcation that supersedes Civ.R. 42(B). *Havel v. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552.

2. MALICE; FRAUD; OR PRINCIPAL'S AUTHORIZATION, PARTICIPATION, OR RATIFICATION. Punitive damages may be awarded against the defendant as a punishment and to discourage others from committing similar wrongful acts. You are not required to award punitive damages to the plaintiff, and you may not do so unless you find that the plaintiff has met his/her/its burden to prove by clear and convincing evidence that the

(Use appropriate alternative[s])

(A) defendant's actions demonstrated actual malice;

(*or*)

(B) defendant's actions demonstrated aggravated or egregious fraud;

(*or*)

(C) defendant, as principal or master, knowingly (authorized) (participated in) (ratified) the actions or omissions of an agent or servant that demonstrated (actual malice) ([aggravated] [egregious] fraud).

COMMENT

Drawn from 2315.21(C); *Columbus Finance, Inc. v. Howard*, 42 Ohio St.2d 178 (1975).

3. ACTUAL MALICE. "Actual malice" necessary for an award of punitive damages is

(Use appropriate alternative[s])

(A) a state of mind characterized by hatred, ill will, or a spirit of revenge;

(or)

(B) a conscious disregard for the rights and safety of another person that has a great probability of causing substantial harm.

COMMENT

Drawn from *Preston v. Murty*, 32 Ohio St.3d 334 (1987); *Moskovitz, Exr., v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638 (1994).

The statute uses the term "malice," while Ohio Supreme Court cases recite a standard for "actual malice." The Committee believes it is better to use the case law term and its common-law definition where there is no evidence that the General Assembly intended a different meaning.

4. SUBSTANTIAL. "Substantial" means major or significant and not trifling or small.

5. AGGRAVATED OR EGREGIOUS FRAUD. Fraud is "aggravated" if it is accompanied by the existence of malice or ill will. Fraud is "egregious" if the fraudulent wrongdoing is particularly gross or malicious.

COMMENT

Drawn from *Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co.*, 12 Ohio St.3d 241 (1984), and *Logsdon v. Graham Ford Co.*, 54 Ohio St.2d 336 (1978).

6. DAMAGES TO NON-PARTIES (ADDITIONAL). Evidence was introduced that (*insert name[s] of defendant[s]*) conduct has resulted in harm to persons other than (*insert name[s] of plaintiff[s]*). You should consider this evidence only for the purpose of helping you decide whether (*insert name[s] of defendant[s]*) showed a conscious disregard for the rights and safety of other persons that had a great probability of causing substantial harm. However, you are not to punish (*insert name[s] of defendant[s]*) for the direct harm his/her/its alleged misconduct caused to other persons.

COMMENT

Drawn from *State Farm v. Campbell*, 538 U.S. 408 (2003), and *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

7. DEFENDANT'S OUT-OF-STATE CONDUCT (ADDITIONAL). Evidence was introduced of (*insert name[s] of defendant[s]*) conduct in (another state) (other states). You should consider this evidence only for the purpose of helping you decide whether (*insert name[s] of defendant[s]*) showed a conscious disregard for the rights and safety of other persons that had a great probability of causing substantial harm. However, you are not to punish (*insert name[s] of defendant[s]*) for the direct harm his/her/its alleged misconduct caused to other persons.

COMMENT

Drawn from *State Farm v. Campbell*, 538 U.S. 408 (2003); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

8. PRINCIPAL AND AGENT. OJI-CV Chapter 423.

9. EMPLOYER AND EMPLOYEE. OJI-CV Chapter 537.

10. CLEAR AND CONVINCING EVIDENCE. OJI-CV 303.07; R.C. 2315.21(D)(4).

11. AMOUNT OF PUNITIVE DAMAGES. If you award punitive damages, it should be presumed that the plaintiff has been made whole for his/her/its injuries by the award of compensatory damages. In determining the amount of punitive damages, you may consider all of the following:

(A) the harm caused was physical as opposed to economic;

(B) the tortious conduct evinced an indifference or a reckless disregard of the health or safety of others;

(C) the target of the conduct had financial vulnerability;

(D) the conduct involved repeated actions or was an isolated incident; and

(E) the harm was a result of intentional malice, trickery or deceit, or mere accident.

The amount you award should be fair and reasonable and should not be influenced by passion or prejudice.

COMMENT

Drawn from *State Farm v. Campbell*, 538 U.S. 408 (2003).

12. ATTORNEY FEES. If you decide that the defendant is liable for punitive damages, you must also decide whether the defendant is liable for the reasonable attorney fees of counsel employed by the plaintiff in the prosecution of this action.

COMMENT

Use alternative (A) in cases in which the court will determine the amount of

attorney fees. Use alternative (B) in cases in which the jury will determine the amount of attorney fees.

(A) JUDGE DETERMINES FEES. If you decide that the defendant is liable for attorney fees, the court will determine the amount.

(B) JURY DETERMINES FEES. In deciding what is a reasonable amount, you may consider all of the following:

COMMENT

The following is drawn from *Villella v. Waikem Motors, Inc.*, 45 Ohio St.3d 36 (1989). See also Prof. Cond. R. 1.5 (a) for additional factors.

(1) the time and labor involved in maintaining the litigation;

(2) the novelty, complexity, and difficulty of the questions involved;

(3) the professional skill required to perform the necessary legal services;

(4) the experience, reputation, and ability of the attorneys; and

(5) the miscellaneous expenses of the litigation.

Additional factors to consider are the fee customarily charged in the locality for similar legal services, the amount involved, and the results obtained.

COMMENT

Although a litigant does not have a constitutional right to a trial by jury as to the determination of whether, or in what amount, attorney fees should be awarded in a tort action, "a trial court must submit to a jury [as a matter of public policy] the issue of whether attorney fees should be awarded in a tort action. The amount of those fees, however, shall be determined by the trial judge who may, in his or her discretion, submit the question of the amount of fees to the jury." *Digital & Analog Design Corp. v. North Supply Co.*, 63 Ohio St.3d 657 (1992), paragraphs two and three of the syllabus. *See also* R.C. 2315.21(D).

13. VERDICT FORMS.

(A) PUNITIVE DAMAGES. We, the jury, find that the plaintiff _____ is _____ is not entitled to an award of punitive damages.

Punitive Damage Amount $ _____

_____ _____

_____ _____

_____ _____

_____ _____

At least six (6) members of the jury must agree in order to reach a verdict on this issue.

(B) ATTORNEY FEES We, the jury, find attorney fees _____ should _____ should not be awarded against the defendant.

_____ _____
_____ _____
_____ _____
_____ _____

At least six (6) members of the jury must agree in order to reach a verdict on this issue.

(C) ATTORNEY FEES ATTORNEY FEES (OPTIONAL) We, the jury, find attorney fees _____ should _____ should not be awarded against the defendant.

Amount of Attorney Fees $ _____

_____ _____
_____ _____
_____ _____
_____ _____

At least six (6) members of the jury must agree in order to reach a verdict on this issue.

CV 315.39 Reasonableness of attorney fees *[Rev. 5-6-06]*

COMMENT

The trial judge shall determine the amount of attorney fees. At his or her discretion, however, the judge may submit this question to the jury. *Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657.

1. GENERAL. In deciding what is a reasonable amount to award for attorney fees, you may consider, among other things, the following:

(*Use applicable alternatives*)

(A) the time necessarily spent by the attorney(s) for (*name of party[ies]*);

(B) the novelty and difficulty of the questions involved in the case;

(C) the skill required to perform the necessary legal services;

(D) the fee(s) customarily charged in (*describe locality*) for similar legal services;

(E) the amount of money involved, the results of the services, or both;

(F) the time (limitations) (urgencies) imposed by the client or by the circumstances;

(G) the experience, reputation and ability of the attorney(s) performing the services; and

(H) the necessary expenses incurred by the attorney(s) in performing the services.

COMMENT

Drawn from *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, and DR 2-106(B), Code of Professional Responsibility.

2. ADDITIONAL. The amount of time necessarily spent on the services may be the first factor you consider but it is neither the only measure of reasonableness nor is it necessarily the most important one. You must take all the facts and circumstances in evidence into consideration in reaching your decision.

COMMENT

Swanson v. Swanson (1976), 48 Ohio App.2d 85.

CV 315.41 Quotient verdict *[Rev. 12-11-10]*

1. If you find for the plaintiff, you may not agree in advance to accept an average figure as the amount of your verdict. If a figure is reached by obtaining an average, such amount is not a proper verdict unless each juror thereafter individually exercises his or her judgment and decides whether he or she will accept such amount. At least six (6) members of the jury must individually accept the amount before it can be a fair and just verdict.

CV 315.43 Mortality table *[Rev. 12-11-10]*

1. PERMANENT INJURY. If you find that plaintiff's injury is permanent, you may consider how long the plaintiff is likely to live.

2. MORTALITY TABLE. The evidence of the life expectancy of people (*insert age of plaintiff*) years of age is an estimate of the average remaining length of life of all persons in this country based upon a limited number of persons of that age. It is an incomplete figure and does not indicate the future life-span of any individual. Such evidence is not conclusive; however, you may consider it along with all the other evidence.

3. DEATH. If you find for the plaintiff, you may consider what the probable normal length of life of the decedent would have been.

CV 315.45 Present value of future damage; income taxes *[Rev. 10/3/15]*

1. PRESENT PECUNIARY VALUE. In the event you find for the plaintiff, the measure of any future damage is the present (loss in dollars) (pecuniary loss) that the

plaintiff with reasonable certainty will sustain in the future and that is capable of measurement by the present value of money. You may not speculate upon any change in the value of the dollar.

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2. INCOME TAXES. OJI-CV 315.01 § 5.

CV 315.49 Wrongful death, compensatory damages *[Rev. 1-21-12]*

1. GENERAL. If you find for the plaintiff you will decide what sum of money will compensate the beneficiaries for the injury and loss to them resulting from the wrongful death of (*insert name of decedent*).

2. DAMAGES. When deciding damages suffered by reason of the wrongful death, you may consider the following:

(A) loss of support from the reasonably expected earning capacity of (*insert name of decedent*);

(B) loss of services of (*insert name of decedent*);

(C) loss of the society of (*insert name of decedent*), including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education suffered by the surviving spouse, dependent children, parents, or next of kin;

(D) loss of prospective inheritance to (*insert name of decedent*)'s heirs at law at the time of his/her death; and

(E) the mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin.

COMMENT

R.C. 2125.02.

The court should eliminate from its charge any factors that are not in evidence.

"Next of kin" and "heirs at law" are not necessarily synonymous terms. "Next of kin" means the nearest surviving relative to the decedent after accounting for parents, children, or spouse. *See In re Estate of Payne*, 10th Dist. No. 04AP-1176, 2005-Ohio-2391. The Committee believes that "heirs at law" means those people entitled to inherit under the laws of testate and intestate succession.

3. REASONABLE FUNERAL AND BURIAL EXPENSES. In addition to an award of compensatory damages, you may make an award for the reasonable funeral and burial expenses, if the plaintiff has established these expenses by the greater weight of the evidence.

COMMENT

R.C. 2125.02(A)(2) provides that the award for funeral and burial expenses must be set forth separately in the verdict.

CV 315.51 Duty to mitigate *[Rev. 12-11-10]*

1. DUTY TO MITIGATE. The defendant claims the plaintiff failed to mitigate his/her damages. If the defendant proves by the greater weight of the evidence that the plaintiff did not (use reasonable diligence) (make reasonable efforts) under the facts and circumstances in evidence to (avoid loss) (lessen damages) caused by the defendant's negligence, you should not allow damages that could have been avoided by (the exercise of reasonable diligence) (reasonable efforts to avoid loss). The plaintiff, however, is not required to take measures that would involve undue risk, burden, or humiliation.

2. MEDICAL OR SURGICAL TREATMENT REASONABLY NECESSARY (ADDITIONAL). If the nature of the injury is such as to render medical or surgical treatment reasonably necessary, it is the duty of the person injured to use ordinary and reasonable diligence to secure the medical or surgical aid. In deciding whether a duty exists to undergo surgical treatment to correct a condition, you may consider the degree of risk involved to the plaintiff in such a procedure and the advice and recommendations of the plaintiff's treating doctor and/or surgeon.

CV 315.53 Nominal damages *[Rev. 1-21-12]*

1. GENERAL. If you find for the plaintiff but the plaintiff failed to prove by the greater weight of the evidence any amount of damages, you may award the plaintiff nominal damages. "Nominal" means trifling or small.

COMMENT

Drawn from *Lacey v. Laird*, 166 Ohio St. 12 (1956).

If actual damages are an element of a claim for relief, then nominal damages alone are not recoverable and an instruction on an award of nominal damages is not appropriate. *Younce v. Baker*, 9 Ohio App.2d 259 (2d Dist. 1966).

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Chapter CV 317

CLOSING INSTRUCTIONS

CV 317.01 Introduction to deliberations: sample instruction ***[Rev. 12-11-10]***

CV 317.03 Common closing remarks: sample instruction ***[Rev. 2/1/20]***

CV 317.05 Alternate juror(s) ***[Rev. 1-21-12]***

CV 317.07 Final closing instructions ***[Rev. 8/6/14]***

CV 317.09 Overnight adjournment ***[Rev. 2-25-12]***

CV 317.01 Introduction to deliberations: sample instruction *[Rev. 12-11-10]*

1. GENERAL. The court has given you the instructions on the law applicable to this case. I will now instruct you on how to conduct your deliberations and prepare your verdict(s).

2. SELECTION OF FOREPERSON. When you go to the jury room, your first function will be to select one of your number to serve as a foreperson. The person you select to preside over your deliberations does not have any greater power, nor does that person's vote have any more importance, than others. The foreperson serves the purpose of helping to conduct your deliberations in an orderly manner and to give each of you the opportunity to express your opinion. One additional duty of the foreperson is to see to it that the verdict form(s) and any exhibits are returned to the court after you have reached a verdict.

3. VERDICT FORM(S). I will now read the verdict form(s).

COMMENT

See Civ.R. 48 regarding number of jurors required to reach a verdict.

4. REQUIRED NUMBER TO REACH VERDICT. In order to conclude this case, it is necessary that at least six (6) members of the jury agree upon the verdict. The members of the jury agreeing upon the verdict must sign their names in ink to the agreed-upon verdict form.

5. DELIBERATIONS AND VERDICT. You are warned not to discuss the status of your deliberations with anyone outside of the jury room, nor are you to discuss your verdict with anyone other than your fellow jurors until it has been returned to the court.

6. VERDICT SIGNED. When you have reached and signed a verdict, you will summon the bailiff who will return you to the courtroom at which time your verdict will be announced.

CV 317.03 Common closing remarks: sample instruction *[Rev. 2/1/20]*

1. The court cannot embody all the law in any single part of these instructions. In considering one portion, you must consider it in light of and in harmony with all the instructions.

2. The court has instructed you on all the law necessary for your deliberations. Whether certain instructions are applicable may depend upon the conclusions you reach on the facts by a greater weight of the evidence. If you have an impression that the court has indicated how any disputed fact should be decided, you must put aside such an impression because that decision must be made by you, based solely upon the facts presented to you in this courtroom.

3. JUDGE ASKING QUESTIONS (OPTIONAL). During trial, I asked some questions. You should not interpret any question by me as an indication of my opinion of the evidence, the facts, or the credibility of a witness. The fact that I asked a question does not mean the question was more important than any question asked by (an attorney) (a party).

COMMENT

Evid.R. 611, 614.

4. SYMPATHY. Circumstances in the case may arouse sympathy for one party or the other. Sympathy is a common human emotion. The law does not expect you to be free of such normal reactions. However, the law and your oath as jurors require you to disregard sympathy and not to permit it to influence your verdict.

5. JUST VERDICT. You must not be influenced by any consideration of sympathy or prejudice. It is your duty to weigh the evidence, to decide the disputed questions of fact, to apply the instructions of law to your findings, and to render your verdict accordingly. Your duty as jurors is to arrive at a fair and just verdict.

6. INITIAL CONDUCT. Your initial conduct upon commencing deliberations is important. It is not wise to express immediately a determination or to insist upon a certain verdict. Having so expressed yourself, your sense of pride may be aroused, and you may hesitate to give up your position even if shown that it is not correct.

7. INDIVIDUAL JUDGMENT. Consult with one another in the jury room, and deliberate with a view to reaching an agreement if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself. You should do so, however, only after a discussion of the case with the other jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should not surrender your considered opinions in order to be congenial or to reach a verdict solely because of the opinion of other jurors.

COMMENT

Section 6 should be given to a jury before it is determined that the jury is unable

to agree. Refer to comment OJI-CR 429.09. If a jury is unable to agree, it may be correct to repeat these instructions and the thoughts in the comment cited.

CV 317.05 Alternate juror(s) *[Rev. 1-21-12]*

1. ROLE OF ALTERNATE JUROR(S). A juror selected as an alternate is not permitted to participate in the jury's deliberations unless one of the other jurors is

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unable to complete his/her service due to illness or other misfortune. It will not be necessary for the alternate(s) to render further service in this case.

COMMENT

Civ.R. 47 regarding alternate jurors is different from Crim.R. 24 that allows a judge to retain alternate jurors through jury deliberations.

2. CAUTION TO ALTERNATE(S). Even though you will not be required to render further service in this case, the court must restrict you from discussing the case with anyone or revealing to anyone how you would have voted. After the jury has returned its verdict and it is announced in court, you are released from this restriction and at that time you may, if you wish, discuss the case. I want to acknowledge the valuable service rendered by the alternate(s) and express my thanks as well as the thanks of the community.

CV 317.07 Final closing instructions *[Rev. 8/6/14]*

1. EXHIBITS AND VERDICT FORM(S). I will give you the exhibits and the verdict form(s). The foreperson will retain possession of these records, including the verdict form(s), and return them to the courtroom when you have reached a verdict. Until your verdict is announced in open court, you are not to disclose to anyone the status of your deliberations or the nature of your verdict.

2. DELIBERATIONS. When you begin your deliberations, first select a foreperson. When six (6) or more jurors agree upon the verdict, you will complete and sign the verdict form(s) in ink and advise the bailiff. You will then return to the courtroom at which time your verdict will be announced.

3. JURY QUESTIONS. If you have a question, the question should be written down and given to the bailiff. The bailiff will deliver the question to the court and I will respond. The question should not reflect the status of your deliberations.

4. DISCUSS CASE. Deliberations may take place only when all jurors are in the jury deliberation room together and with no one else present. Should any juror leave the room, all deliberations must cease until all jurors are together. During your deliberations no juror is permitted to disclose to anyone the status of your deliberations or the nature of your verdict. This order must be strictly obeyed. During recesses you may not discuss the case with anyone, even other jurors. After your verdict is returned and announced in court, you may discuss the case with anyone but you are not required to do so.

COMMENT

At this point, outside the hearing of the jury, counsel should be asked for any objections to the instructions. The responses should be placed on the record.

5. UNDEFINED TERMS. Where a term has not been defined for you, you must give that term its common and ordinary meaning.

COMMENT

If, during deliberations, the jury requests a definition of a term or word in the instructions that has not been defined, the trial judge and counsel should try to agree on a definition to provide to the jury.

6. JURY RETIRES. You will now retire to begin deliberations. If you have any questions about administrative matters such as breaks or meals, you should ask the bailiff.

CV 317.09 Overnight adjournment *[Rev. 2-25-12]*

1. GENERAL. Before leaving for the day, the foreperson must deliver all exhibits, verdict forms, and notes to the bailiff who will hold them until deliberations resume.

2. CAUTION. The court reminds you not to discuss the case. You are also reminded not to obtain or receive information concerning this case from outside the courtroom. You must not read, listen to, or watch any source of information relating to the case. You must report to the bailiff or the court any attempt by anyone to discuss the case with you or in your presence. Any violation of this order could result in a mistrial.

Chapter CV 319

DELIBERATIONS

CV 319.07 Deadlock *[Rev. 8/15/18]*

CV 319.07 Deadlock *[Rev. 8/15/18]*

1. CAREFUL CONSIDERATION. I am going to give you an instruction that courts in Ohio give in this situation. The process of discussion and deliberation in the jury room is necessarily slow and requires consideration and patience. The secrecy that surrounds your efforts prevents others, including the court, from knowing when your efforts will result in a verdict. If, after following this instruction, you are still unable to reach a verdict, please advise the court in writing.

2. DEADLOCKED. In a large number of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere consent to the conclusion of the other jurors, each question submitted to you should be examined with proper regard and deference to the opinions of other jurors. You should consider it desirable that the case be decided. You are selected in the same manner, and from the same source, as any future jury would be. There is no reason to believe the case will ever be submitted to a jury more capable, impartial, or intelligent than this one. Likewise, there is no reason to believe that more or clearer evidence will be produced by either side. It is your duty to decide the case, if you can honestly do so. You should listen to one another's arguments with a disposition to be persuaded. Do not hesitate to reexamine your views and change your position if you are convinced it is wrong. As there is disagreement, all jurors should reexamine their positions, given that a verdict has not been reached. Jurors more in favor of the plaintiff should consider whether their position is correct considering that it is not shared by others, equally honest, who have heard the same evidence, with the same desire to arrive at the truth, and under the same oath. Likewise, jurors more in favor of the defendant should ask themselves whether their position is correct considering that it is not shared by other jurors.

COMMENT

The foregoing is a modification of the supplemental instruction approved by the *Supreme Court of Ohio in State v. Howard*, 42 Ohio St.3d 18 (1989), paragraph two of the syllabus.

3. VERDICT IMPOSSIBLE. I have been advised that you cannot reach an agreement within a reasonable time. (*Read the note from the jury indicating that the jury cannot reach an agreement.*) (*Ask the foreperson to affirm that the jury cannot reach an agreement*).

4. FAILURE TO ANSWER INTERROGATORIES. You have reported to the Court that at least six of you cannot agree on an answer to Interrogatory (*insert number of interrogatory*). The Court urges each of you to exert every possible effort so that six or more of you answer all the Interrogatories you are required to answer in order to arrive at a verdict. Please return to the jury room for further deliberations.

5. MISTRIAL DECLARED. Because you are unable to reach a verdict, I declare this case a mistrial. I want to express my appreciation for your sincere, conscientious efforts. Members of the jury, you are discharged from further duty in this case.

COMMENT

See McBride, The Art of Instructing The Jury (1969), Section 3.61 et seq.

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TITLE 4

CIVIL SUBJECT MATTER INSTRUCTIONS: TORT-RELATED ISSUES

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Chapter CV 403 COMPARATIVE NEGLIGENCE
Chapter CV 405 PROXIMATE CAUSE
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Chapter CV 401

NEGLIGENCE

CV 401.01 Negligence *[Rev. 5-12-12]*

CV 401.03 Custom *[Rev. 5-12-12]*

CV 401.05 Duty to look *[Rev. 5-12-12]*

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CV 401.33 Res ipsa loquitur *[Rev. 5-12-12]*

CV 401.35 Common carrier *[Rev. 5-12-12]*

CV 401.39 Concurrent but independent negligence *[Rev. 5-12-12]*

CV 401.41 Reckless conduct, wanton or willful misconduct *[Rev. 10/3/15]*

CV 401.01 Negligence *[Rev. 5-12-12]*

1. NEGLIGENCE. Negligence is a failure to use (reasonable) (ordinary) care. Every person is required to use (reasonable) (ordinary) care to avoid injuring (another person) (another's property).

COMMENT

An instruction that the law "presumes" that a party was free from negligence is not a true presumption and is misleading. This and similar instructions have been held to be error. *Ayers v. Woodard*, 166 Ohio St. 138 (1957).

2. (REASONABLE) (ORDINARY) CARE. (Reasonable) (Ordinary) care is the care that a reasonably careful person would use under the same or similar circumstances.

3. STATUTORY. A person may be required by law to do something or not to do

something. Failure to do what is required by law is negligence, as is doing something the law prohibits.

COMMENT

A statute may either prescribe a general standard of ordinary care that is a rule of conduct or define a specific, mandatory act or duty that becomes a rule of law. *See Eisenhuth v. Moneyhon*, 161 Ohio St. 367 (1954).

4. FORESEEABILITY. OJI-CV 401.07.

COMMENT

For arrangement of instructions, see OJI-CV Chapter 311. For specific Motor Vehicle Act violations, see OJI-CV Chapter 411.

"Guilt" and "guilty of negligence" should never be used.

CV 401.03 Custom *[Rev. 5-12-12]*

1. GENERAL. Evidence was introduced as to what the defendant(s) and others who perform the same (act) (activity) customarily do under the circumstances because the (act) (activity) of the defendant(s) involves a matter not within the general public's common knowledge.

2. WEIGHT OF CUSTOM. Evidence of customary (methods) (conduct) of others similarly situated is not a conclusive test of negligence. You may consider the degree to which such (methods) (conduct) have been customarily used and accepted if the defendant(s) had knowledge or should have had knowledge of them. If there is a commonly accepted custom that the defendant(s) knew or should have known, you may consider this along with all other facts and circumstances in this case when deciding whether the defendant(s) (was) (were) negligent.

COMMENT

This instruction cannot be used when there is a standard of conduct that is within the common knowledge of the jury. *Spargur v. Dayton Power & Light Co.*, 109 Ohio App. 37 (2d Dist. 1959); *Jones v. Village of Girard*, 111 Ohio St. 258 (1924); *Abercrombie v. Roof*, 64 Ohio App. 365 (1st Dist. 1940). Such evidence may be admitted if, in the discretion of the court, its helpfulness outweighs the risk and disadvantage of injecting collateral issues. *Schwer v. New York C., Chicago & St. Louis Rd. Co.*, 161 Ohio St. 15 (1954); *Witherspoon v. Haft*, 157 Ohio St. 474 (1952); *Ault v. Hall*, 119 Ohio St. 422 (1928).

(Text continued on page 129)

CV 401.05 Duty to look *[Rev. 5-12-12]*

1. DUTY TO LOOK. The (plaintiff[s]) (defendant[s]) (is) (are) required to use ordinary care to discover and avoid danger.

2. LOOK EFFECTIVELY. A person is negligent if he/she looks but does not see that which would have been seen by a reasonably (cautious) (careful) (prudent) person under the same or similar circumstances.

COMMENT

See Deming v. Osinski, 24 Ohio St.2d 179 (1970).

3. CONTINUE TO LOOK. A person is negligent if he/she does not continue to look if, under the circumstances, a reasonably (cautious) (careful) (prudent) person would have continued to look.

COMMENT

A pedestrian using a public sidewalk is not required to look continuously downward for hazards. However, a diversion of the attention of a pedestrian may constitute negligence for not observing that which otherwise would have been seen. *Grossnickle v. Village of Germantown*, 3 Ohio St.2d 96 (1965); *Moore v. Geiger*, 6 Ohio App.2d 14 (3d Dist. 1966).

4. FAILURE TO LOOK - PRESENCE OF CHILDREN. OJI-CV Chapter 407.

CV 401.07 Foreseeability *[Rev. 8/5/15]*

1. GENERAL. In deciding whether (reasonable) (ordinary) care was used, you must consider whether the defendant(s) should have foreseen under the circumstances that the likely result of an act or failure to act would cause (injuries) (damages).

2. TEST. The test for foreseeability is not whether a person should have foreseen the (injuries) (damages) exactly as it happened to the specific (person) (property). The test is whether under the circumstances a reasonably careful person would have anticipated that an act or failure to act would likely (result in) (cause) (injuries) (damages).

COMMENT

Texler v. D.O. Summers, 81 Ohio St.3d 677 (1998); *Mudrich v. Std. Oil Co.*, 153 Ohio St. 31 (1950).

For medical negligence cases, see CV 417.03 § 8. *See also Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229. The reasoning of *Cromer* may also apply to other professional negligence cases.

CV 401.09 Person under disability *[Rev. 5-12-12]*

1. NEGLIGENCE. OJI-CV 401.01.

2. PLAINTIFF UNDER DISABILITY. The rule of ordinary care applies to a person who has a physical (disability) (infirmity). The plaintiff must exercise the same amount of care a reasonably (cautious) (careful) (prudent) person who is similarly challenged would use under the same or similar circumstances. Ordinary care in (his) (her) situation is the amount of care that a reasonably (cautious) (careful) (prudent) person with the same (disability) (infirmity) would use under the same or similar circumstances.

COMMENT

Cleveland, Columbus & Cincinnati RR. Co. v. Terry, 8 Ohio St. 570 (1858); *Becka v. Horvath*, 90 Ohio Law Abs. 574 (1962).

3. DEFENDANT(S) - NO KNOWLEDGE OF DISABILITY. The existence of the plaintiff's (disability) (infirmity) does not increase the duty of the defendant(s) in the exercise of ordinary care unless you find that the defendant(s) knew or should have known of the plaintiff's (disability) (infirmity).

COMMENT

Cleveland, Columbus & Cincinnati RR. Co. v. Terry, 8 Ohio St. 570 (1858).

4. WITH NOTICE OF DISABILITY. If you find that the defendant(s) (knew) (in the exercise of ordinary care should have known) that the plaintiff had a (disability) (infirmity), then such knowledge or the extent of notice of the (disability) (infirmity) is one of the circumstances to be considered in deciding whether the defendant(s) used the same amount of care that a reasonably (cautious) (careful) (prudent) person would use toward such a (disabled) (infirm) person under the same or similar circumstances.

COMMENT

This instruction goes beyond the decision in *Cleveland, Columbus & Cincinnati RR. Co. v. Terry*, 8 Ohio St. 570 (1858), by including consideration of the question of whether in the exercise of ordinary care the defendant(s) should have known or have discovered the existence of the disability. This element is significant where the disability is obvious. *Bennett v. McDonald*, 118 Ohio App. 82 (9th Dist. 1962). *See also Feldman v. Howard*, 10 Ohio St.2d 189 (1967).

CV 401.11 Ordinary care involving dangerous substances *[Rev. 5-12-12]*

1. GENERAL. The defendant(s) (distribute[s]) (sell[s]) (*describe other activity*) (gas) (electricity) (*insert name of other dangerous substance*) for (domestic) (commercial) purposes. (Gas) (Electricity) (*Insert name of other dangerous substance*)

(Text continued on page 131)

is an inherently dangerous substance. The defendant(s) in the use of ordinary care must use that degree of care that is proportionate to the danger. (It) (He/She) (They) must use such care as reasonably careful and skilled persons, engaged in the same business, would use under the same or similar circumstances. A failure to use this degree of care constitutes negligence.

COMMENT

Suiter v. The Ohio Valley Gas Co., 10 Ohio St.2d 77 (1967); *Springsteel v. Jones & Laughlin Steel Corp.*, 2 Ohio App.2d 353 (8th Dist. 1963).

CV 401.13 Sudden emergency *[Rev. 5-12-12]*

1. GENERAL. The defendant(s) (is) (are) required to prove by the greater weight of the evidence

(A) that he/she/it/they (was) (were) confronted by a sudden or unexpected emergency;

(B) that the claimed emergency was not the result of any (fault) (negligence) of the defendant(s), or any circumstance under his/her/its/their control; and

(C) that he/she/it/they exercised such care as a reasonably (cautious) (careful) (prudent) person would exercise under the same or similar circumstances.

COMMENT

Radecki v. Lammers, 15 Ohio St.2d 101 (1968).

CV 401.15 Sudden emergency—legal excuse *[Rev. 12-8-12]*

1. GENERAL. The defendant claims that although he did violate a statute (in crossing to the left of the center line), this action was not negligence because he was faced with a sudden emergency.

2. ISSUE OF SUDDEN EMERGENCY. An operator of a motor vehicle who (fails to comply with a safety statute) (crosses to the left of the center line) is excused from such failure to comply with the statute, and he avoids the legal effect of negligence arising therefrom by establishing by the greater weight of the evidence that, without fault on his part and because of circumstances over which he had no control, he was confronted by a sudden and unforeseeable emergency which made compliance with such statute impossible. If you find that these conditions existed, the defendant is excused from a violation of such statute.

COMMENT

Satterthwaite v. Morgan (1943), 141 Ohio St. 447, 48 N.E.2d 653, 25 O.O. 581.

See *Childers v. Uhrig* (1970), 23 Ohio Misc. 172, 255 N.E.2d 574, 51 O.O.2d 378.

3. DUTY IN SUDDEN EMERGENCY. If you find that the defendant was excused from complying with the statute because of a sudden emergency, he is still required to use ordinary care under the circumstances. Ordinary care is such care as a reasonably (cautious) (careful) (prudent) person would use under the same or similar circumstances. You will consider the (danger) (confusion) (excitement) of the situation, and, along with the other facts, you will decide whether the defendant used ordinary care.

COMMENT

Childers v. Uhrig (1970), 23 Ohio Misc. 172, 255 N.E.2d 574, 51 O.O.2d 378.

CV 401.17 Intoxication *[Rev. 12-8-12]*

1. If you find that the (defendant) (plaintiff) was under the influence of (alcohol) (drug of abuse), such fact would not necessarily make him negligent. However, every person is required to use ordinary care at all times. Being under the influence of . . . . . is not an excuse for a failure to fully perform this or any other duty. If you find that the (defendant) (plaintiff) was under the influence of (alcohol) (drug of abuse) at the time (of the collision), you will consider that fact along with all the evidence to decide whether he used ordinary care under the circumstances.

2. If you find that the (defendant) (plaintiff) did use the (degree) (amount) of care that a reasonably (cautious) (careful) (prudent) and sober person would have used under the same or similar circumstances, then it would not matter if he was under the influence of . . . . . On the other hand, if you find that he did not use that amount of ordinary care, then he was negligent.

COMMENT

The above instruction has general application; however, if the claim of negligence is based upon R.C. 4511.19, see OJI-CV 411.25 and OJI-CR 525.13.

Intoxication or being under the influence is a matter of common knowledge and requires no definition in determining the existence of ordinary care.

For drug of abuse, see R.C. 3719.01.

CV 401.19 General caution signs (not a traffic control device) *[Rev. 5-12-12]*

1. GENERAL. If you find that at the time in question a sign was displayed containing (*describe content of sign*), you may consider the presence of the sign when deciding whether the (defendant) (plaintiff) used ordinary care under all the circumstances.

COMMENT

This instruction is designed for general caution warning signs and not for traffic signs and devices containing a specific order. OJI-CV Chapter 411.

CV 401.21 Loss of consciousness or other medical emergency *[Rev. 5-12-12]*

1. GENERAL. The failure of a person to use ordinary care is negligence. However, such negligence is excused if the person proves by the greater weight of the evidence that he/she was suddenly stricken by a (loss of consciousness) (*describe other medical emergency*) that he/she could not reasonably have foreseen and that rendered it impossible for him/her to exercise ordinary care.

2. FORESEEABILITY. To decide whether (*insert name of person*) had reasonable cause to foresee the possibility of sudden (loss of consciousness) (*describe other medical emergency*), you should consider whether the evidence establishes that he/she had previous experiences or knowledge that would have warned a reasonably (cautious) (careful) (prudent) person under the same or similar circumstances of a likelihood of such (loss of consciousness) (*describe other medical emergency*).

3. BURDEN. (Loss of consciousness) (*Describe other medical emergency*) is an affirmative defense. The burden of proof is upon the (*insert name of person*) to establish by the greater weight of the evidence that he/she was suddenly stricken by a (loss of consciousness) (*describe other medical emergency*) that in the exercise of ordinary care he/she had no reason to foresee.

COMMENT

Falling asleep at the wheel of a motor vehicle is negligence. *Roman v. Gobbo*, 99 Ohio St.3d 260, 2003-Ohio-3655, reaffirming *Lehman v. Haynam*, 164 Ohio St. 595 (1956).

CV 401.23 Mechanical failure *[Rev. 5-12-12]*

1. GENERAL. The failure of a person to use ordinary care is negligence. However, such negligence is excused if the person proves by the greater weight of the evidence that he/she was unable to exercise ordinary care due to the (*describe mechanical failure*), that the (*describe mechanical failure*) was not reasonably foreseeable, that (*describe mechanical failure*) occurred without his/her fault, and that (*describe mechanical failure*) rendered it impossible for him/her to exercise ordinary care.

COMMENT

Bush v. Harvey Transfer Co., 146 Ohio St. 657 (1946); *Kormos v. Cleveland*

Retail Credit Men's Co., 131 Ohio St. 471 (1936).

2. FORESEEABILITY. OJI-CV 401.07.

CV 401.25 Act of God *[Rev. 5-12-12]*

1. AFFIRMATIVE DEFENSE. The defendant(s) claim(s) that he/she/it/they cannot be held responsible for any (injuries) (damages) because the (injuries) (damages) were caused solely by an act of God.

2. ACT OF GOD. An "act of God" means any event that is caused by natural forces beyond human control, such as an earthquake, violent storm, lightning, flood, (*describe other act of God*) that could not be reasonably anticipated or guarded against.

3. SOLE CAUSE. The defendant(s) cannot escape responsibility for any (injuries) (damages) unless they were proximately caused solely by an act of God. If the (injuries) (damages) were proximately caused by the negligence of the defendant(s) combined with an act of God, the defendant(s) (is) (are) responsible.

4. SEVERAL CAUSES. There may be more than one (proximate) (direct) cause of the (injuries) (damages). The fact that some other cause combined with the negligence of the defendant(s) in producing (injuries) (damages) does not relieve him/her/it/them from liability unless it is shown such other cause would have produced the (injuries) (damages) independently of the defendant('s) (s') negligence.

5. BURDEN. The defendant(s) (is) (are) required to prove by the greater weight of the evidence that

(A) he/she/it/they exercised such care as a reasonably (cautious) (careful) (prudent) person would exercise under the same or similar circumstances;

(B) that the (injuries) (damages) were caused by an act of God; and

(C) the act of God was the sole proximate cause of the (injuries) (damages).

6. CONCLUSION. If you find that the defendant(s) (was) (were) negligent and that his/her/its/their negligence, either alone or in combination with an act of God, proximately caused the plaintiff's (injuries) (damages), then your verdict must be for the plaintiff.

If you find that the defendant(s) (was) (were) not negligent, or if you find that an act of God was the sole proximate cause of the plaintiff's (injuries) (damages), then your verdict must be for the defendant(s).

CV 401.33 Res ipsa loquitur *[Rev. 5-12-12]*

1. GENERAL. Where the (instrument) (vehicle) (occurrence) that caused the (injuries) (damages) is in the exclusive (control) (management) of the defendant(s) at the time the (injury) (damage) occurred and the event is one that would not have happened if ordinary care had been used, you may, but are not required to, infer from these circumstances that the defendant(s) (was) (were) negligent. In deciding whether

to apply this inference you should consider all the evidence including evidence that the defendant(s) used ordinary care.

COMMENT

A court must determine on a case-by-case basis whether this instruction should be given. Res ipsa loquitur is founded upon an absence of specific proof concerning acts or omissions that would constitute negligence. If the evidence supports two or more equally plausible causes of the injuries, one of which is not attributable to negligence, this instruction should not be given. However, a plaintiff seeking to invoke the doctrine need not eliminate all reasonable non-negligent causes of the injuries. It is sufficient if there is evidence from which a reasonable person can find that it is more probable than not that the injury was the proximate result of a defendant's negligent act or omission. *Estate of Hall v. Akron General Medical Center*, 125 Ohio St.3d 300 (2010); *Jennings Buick, Inc. v. City of Cincinnati*, 63 Ohio St.2d 167 (1980); *Walker v. Mobil Oil Corp.*, 45 Ohio St.2d 19 (1976); *Hake v. George Wiedemann Brewing Co.*, 23 Ohio St.2d 65 (1970).

2. INFERENCE. "Inference" means is to reach a reasonable (conclusion) (deduction) of fact from other facts that you find have been established by direct evidence. An inference is reasonable when the (conclusion) (deduction) naturally and logically follows, according to the common experience of humankind. It rests entirely with you whether you make any one or more inferences.

3. DIRECT EVIDENCE (ADDITIONAL). The plaintiff claims that direct evidence proves that the defendant(s) (was) (were) negligent in addition to the inference(s) just discussed.

COMMENT

If evidence of specific acts of negligence was introduced, the instruction on *res ipsa loquitur* may be given. *Oberlin v. Friedman*, 5 Ohio St.2d 1 (1965).

The doctrine of *res ipsa loquitur* may be applied where a single instrumentality is in the control of several persons. *Dearth v. Self*, 8 Ohio App.2d 33 (1966); *Bauer v. Pullman Co.*, 8 Ohio App.2d 1 (1966), *modified for other reasons*, 15 Ohio App.2d 69 (1968).

CV 401.35 Common carrier *[Rev. 5-12-12]*

1. GENERAL. The plaintiff claims that the defendant(s) (was) (were) a common carrier at the time of the accident.

2. COMMON CARRIER. A "common carrier" is one who undertakes for compensation, as a business and not as a casual occupation, to carry (persons) (goods) from one place to another and holds itself ready to serve the public for such transportation.

A common carrier is required to carry anyone who may request it to the limit of its capacity when (compensation is tendered) (some benefit exists).

3. HIGHEST DEGREE OF CARE. The operator of the (*describe common carrier*) must use the highest degree of care for the safety of passengers or property that a reasonably careful and skilled person, engaged in the same business, would use under the same circumstances consistent with the practical operation of its business and applicable safety rules and regulations. A failure to use such care is negligence.

COMMENT

Dietrich v. Community Traction Co., 1 Ohio St.2d 38 (1964); *Nicholas v. Yellow Cab Co.*, 116 Ohio App. 402 (1962). A common carrier does not guarantee safety. Reference to such liability is not recommended. Similarly, reference to responsibility for the "slightest neglect" is error. *Bahm v. Pittsburgh & Lake Erie Rd. Co.*, 6 Ohio St.2d 192 (1966).

CV 401.39 Concurrent but independent negligence *[Rev. 5-12-12]*

1. GENERAL. If a person is injured by the negligence of two (or more) persons who act independently, and their acts (combine) (concur) to proximately cause injury, each of the wrongdoers is liable to such person for the full amount of the damage. The injured person may enforce his/her claim in an action against (all jointly) (any one of them individually) (any number of them).

2. PROXIMATE CAUSE. OJI-CV 405.01.

3. REMOTE CAUSE OR CONDITION. OJI-CV 405.03.

4. INTERVENING AND SUPERSEDING CAUSES. OJI-CV 405.05.

5. COMPARATIVE NEGLIGENCE. OJI-CV Chapter 403.

CV 401.41 Reckless conduct, wanton or willful misconduct *[Rev. 10/3/15]*

COMMENT

"Willful," "wanton," and "reckless" describe different and distinct degrees of care and are not interchangeable. *Anderson v. City of Massillon*, 134 Ohio St. 3d 380, 2012-Ohio-5711, *modifying Thompson v. McNeill*, 53 Ohio St.3d 102 (1990).

The violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct. *Anderson v. City of Massillon*, 134 Ohio St. 3d 380, 2012-Ohio-5711.

1. RECKLESS CONDUCT. "Reckless conduct" is an act or an intentional failure to act where there is a duty to act, and the facts would lead a reasonable person to realize

not only that his/her conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his/her conduct negligent.

COMMENT

Drawn from 2 Restatement of the Law 2d, Torts, Section 500, at 587 (1965).

In *Anderson v. City of Massillon*, 134 Ohio St. 3d 380, 2012-Ohio-5711, the Supreme Court of Ohio adopted the Restatement using the following language: "reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *See also Thompson v. McNeill*, 53 Ohio St.3d 102 (1990); and *Marchetti v. Kalish*, 53 Ohio St.3d 95 (1990).

2. WANTON MISCONDUCT. "Wanton misconduct" differs from ordinary negligence in that it implies a failure to use any care for the plaintiff and an indifference to the consequences, when the probability that harm would result from such failure is great, and such probability is known to the defendant(s).

COMMENT

Drawn from *Anderson v. City of Massillon*, 134 Ohio St. 3d 380, 2012-Ohio-5711, citing *Hawkins v. Ivy*, 50 Ohio St.2d 114 (1977).

Contributory negligence was not a defense to willful or wanton misconduct at common law. *Kellerman v. J.S. Durig Co.*, 176 Ohio St. 320 (1964). With the enactment of S.B. 120, effective 04/09/2003, contributory negligence, assumption of the risk and "other tortious conduct" are defenses to non-intentional tortious conduct. R.C. 2307.22 and 2315.32. S.B. 120 now appears to permit the defense of contributory fault to all claims of wanton misconduct and may permit the defense to some claims of willful misconduct as defined below. See R.C. 2307.011(D) for the definition of "intentional tort claim."

3. WILLFUL MISCONDUCT. "Willful misconduct" implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury.

COMMENT

Drawn from *Anderson v. City of Massillon*, 134 Ohio St. 3d 380, 2012-Ohio-5711, citing *Tighe v. Diamond*, 149 Ohio St. 520 (1948).

Actual ill will or an intent to injure need not be present. *Tighe v. Diamond*, 149 Ohio St. 520 (1948).

Contributory negligence was not a defense to willful or wanton misconduct at common law. *Kellerman v. J.S. Durig Co.*, 176 Ohio St. 320 (1964). With the enactment of S.B. 120, effective 04/09/2003, contributory negligence, assumption of the risk and "other tortious conduct" are defenses to non-intentional tortious conduct. R.C. 2307.22 and 2315.32. S.B. 120 now appears to permit the defense of contributory fault to all claims of wanton misconduct, and may permit the defense to some claims of willful misconduct as defined above. See R.C. 2307.011(D) for the definition of "intentional tort claim."

4. NEGLIGENCE. OJI-CV Chapter 401.

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Chapter CV 403

COMPARATIVE NEGLIGENCE

CV 403.01 Comparative negligence: one defendant (claims arising before 1/5/88) *[Rev. 1/9/16]*

CV 403.01 Comparative negligence: one defendant, interrogatories on future damages not required (claims arising on and after 1/5/88 but before 4/9/03) *[Rev. 1/9/16]*

CV 403.01 Contributory fault: one defendant, interrogatories on future damages not required (claims arising on and after 4/9/03) *[Rev. 1/9/16]*

CV 403.03 Comparative negligence: more than one defendant (claims arising before 1/5/88) *[Rev. 1/9/16]*

CV 403.03 Comparative negligence: more than one defendant, interrogatories on future damages not required (claims arising on and after 1/5/88 but before 4/9/03) *[Rev. 1/9/16]*

CV 403.03 Comparative fault: more than one defendant, interrogatories on future damages not required (claims arising on and after 4/9/03) *[Rev. 1/9/16]*

CV 403.05 Comparative negligence: one defendant, interrogatories on future damages required (claims arising on and after 1/5/88 but before 4/9/03) *[Rev. 5-14-05]*

CV 403.05 Comparative fault: one defendant, interrogatories on future damages required (claims arising on and after 4/9/03) *[Rev. 12-11-05]*

CV 403.07 Comparative negligence: more than one defendant, interrogatories on future damages required (claims arising on and after 1/5/88 but before 4/9/03) *[Rev. 5-14-05]*

CV 403.07 Comparative fault: more than one defendant, interrogatories on future damages required (claims arising on and after 4/9/03) *[Rev. 12-11-05]*

CV 403.09 Assumption of the risk *[Rev. 10/14/17]*

CV 403.11 Rescue or attempted rescue of another

CV 403.13 Last clear chance

CV 403.01 Comparative negligence: one defendant (claims arising before 1/5/88) *[Rev. 1/9/16]*

COMMENT

The following instructions apply to negligence claims that do not fall within the scope of R.C. 2315.19 as amended effective 1/5/88.

In comparative negligence trials, three-fourths of the jury must agree as to the causal negligence of both parties, and only those jurors who so find may participate in the apportionment of negligence. *O'Connell v. Chesapeake & Ohio O. R. Co.*, 58 Ohio St.3d 226 (1991), which holds it is plain error to enter judgment for the plaintiff when the interrogatories answered by the jury disclosed that two jurors

who did not agree on the negligence of the sole defendant and its proximate cause of the injury had joined in the apportionment of negligence and the damages.

In the case of *Dillon v. OhioHealth Corp.*, 10th Dist. Nos. 13AP-467, 14AP-259, 2015-Ohio-1389, *appeal not accepted*, 144 Ohio St.3d 1407, 2015-Ohio-4947, however, the court held that "a juror who failed to find negligence was still able to determine proximate cause."

1. GENERAL. The defendant claims that the plaintiff (was negligent) (impliedly assumed the risk of injury). (The plaintiff was negligent if he/she failed to use that care for his/her own safety which a reasonably [cautious] [careful] [prudent] person would use under the same or similar circumstances.) (The plaintiff impliedly assumed the risk of injury if he/she had knowledge of a condition that was obviously dangerous to him/her and voluntarily exposed himself/herself to that risk of injury).

COMMENT

The definition of implied assumption of the risk is drawn from Anderson v. Ceccardi, 6 Ohio St.3d 110 (1983), and Briere v. Lathrop Co., 22 Ohio St.2d 166 (1970), 174–75. *See also*, Cremeans v. Willmar Henderson Mfg. Co., 57 Ohio St.3d 145 (1991) (an employee does not voluntarily assume the risk of injury in the course of his/her employment when the risk must be encountered in the normal performance of his/her required job duties and responsibilities).

2. INTRODUCTION TO INTERROGATORIES. You will be given written questions called interrogatories. You must answer them in writing, starting with the first question. You must follow carefully the directions about how to proceed, because the directions will tell you which of you may participate as well as what questions to answer and whether to sign the general verdict for the plaintiff or for the defendant. A question is answered when at least (six) (three-fourths) of the jurors agree. All who agree must sign. If (six) (three-fourths) jurors cannot agree on an answer, you will be instructed to report to the court.

3. INTERROGATORIES.

COMMENT

The Committee believes that the jurors will better understand interrogatories if the judge reviews them in detail while each juror has a copy of the interrogatories in hand.

Only the parties to the trial can be included in the interrogatories, and it is plain error to include non-parties. *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 475.

(Text continued on page 145)

(A) WAS THE DEFENDANT NEGLIGENT?

CIRCLE YOUR ANSWER IN INK YES or NO

. . . . . .
. . . . . .
. . . . . .
. . . . . .

(1) If the answer of (six) (three-fourths) or more jurors to (A) is "yes," move to Interrogatory (B) and only those jurors who answered "yes" to (A) may participate.

(2) If the answer of (six) (three-fourths) or more jurors to (A) is "no," sign the general verdict for the defendant and report to the court that you have completed your deliberations.

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (A), report this to the court.

(B) WAS THE DEFENDANT'S NEGLIGENCE A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK YES or NO

. . . . . .
. . . . . .
. . . . . .
. . . . . .

(1) If the answer of (six) (three-fourths) or more jurors to (B) is "yes," move to Interrogatory (C).

(2) If the answer of (six) (three-fourths) or more jurors to (B) is "no, sign the general verdict for the defendant and report to the court that you have completed your deliberations.

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (B), report this to the court.

(C) (WAS THE PLAINTIFF NEGLIGENT?) (DID THE PLAINTIFF IMPLIEDLY ASSUME THE RISK OF INJURY?)

CIRCLE YOUR ANSWER IN INK YES or NO

. . . . . .
. . . . . .
. . . . . .
. . . . . .

(1) If the answer of (six) (three-fourths) or more jurors to (C) is "yes," move to Interrogatory (D) and only those jurors who answered "yes" to (C) may participate.

(2) If the answer of (six) (three-fourths) or more jurors to (C) is "no," move to Interrogatory (E).

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (C), report this to the court.

(D) WAS THE PLAINTIFF'S (NEGLIGENCE) (ASSUMPTION OF THE RISK) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
. . . . .	. . . . .
. . . . .	. . . . .
. . . . .	. . . . .
. . . . .	. . . . .

(1) If the answer of (six) (three-fourths) or more jurors to (D) is "yes" or "no," move to Interrogatory (E).

(2) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (D), report this to the court.

(3) In answering the following Interrogatory (E) about the percentages of negligence that directly and proximately caused the plaintiff's (injury) (damages), please observe the following:

(a) only those jurors who answered "yes" to all four Interrogatories (A), (B), (C), and (D) are qualified to participate in answering Interrogatory (E), and

(b) if less than (six) (three-fourths) jurors are qualified to answer (E), report this to the court.

(E) STATE THE PERCENTAGES OF (NEGLIGENCE) (ASSUMPTION OF RISK) OF THE PLAINTIFF AND NEGLIGENCE OF DEFENDANT THAT DIRECTLY AND PROXIMATELY CAUSED THE PLAINTIFF'S (INJURY) (DAMAGES).

(1) ENTER PERCENTAGES.

(a) PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) ATTRIBUTABLE TO THE PLAINTIFF: _____%

(b) PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO THE DEFENDANT: _____%

(c) The percentages attributable to plaintiff and defendant must equal the total of:

100%

. . . . .	. . . . .
. . . . .	. . . . .

. . . . . .
. . . . . .

(2) If (six) (three-fourths) jurors who are qualified cannot agree on an answer to (E), report this to the court.

(3) If the percentage attributed to the plaintiff is 50% or less,

(a) move to Interrogatory (F), and all the jurors shall participate in the deliberations, and

(b) sign the general verdict for the plaintiff.

(4) If the percentage attributable to the plaintiff is greater than 50%,

(a) do not answer Interrogatory (F),

(b) sign the general verdict for the defendant, and

(c) report to the court that you have completed your deliberations.

(F) STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES TO THE PLAINTIFF WITHOUT REGARD TO THE PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (OR BOTH) ATTRIBUTED TO THE PLAINTIFF.

STATE YOUR ANSWER IN FIGURES IN INK $_____

. . . . . .
. . . . . .
. . . . . .
. . . . . .

COMMENT

The Committee believes that because the issues relating to damages are analytically different from those relating to causal negligence, the determination of damages may be made by all jurors without regard to their individual votes on causal negligence.

4. GENERAL VERDICT.

COMMENT

The Committee believes that two separate verdict forms should be used and explained to the jury.

(A) WE, THE JURY, DO HEREBY FIND FOR THE PLAINTIFF AND WE FIND THAT THE TOTAL AMOUNT OF DAMAGES IS $_____, AS DECIDED IN INTERROGATORY (F).

. . . . . .
. . . . . .
. . . . . .
. . . . . .

(B) WE, THE JURY, DO HEREBY FIND FOR THE DEFENDANT.

. . . . . .
. . . . . .
. . . . . .
. . . . . .

COMMENT

It is error to fail to have the jury return a general verdict, whether or not interrogatories are also answered. Calmes v. Goodyear Tire & Rubber Co., 61 Ohio St.3d 470 (1991).

R.C. 2315.18 requires that the general verdict determine the amount of the recovery. R.C. 2315.19(C) requires the court to diminish the total compensatory damages by the percentage of negligence attributable to the plaintiff.

CV 403.01 Comparative negligence: one defendant, interrogatories on future damages not required (claims arising on and after 1/5/88 but before 4/9/03) *[Rev. 1/9/16]*

COMMENT

The instructions at OJI-CV 403.01 (claims arising before 1/5/88) will serve in cases with one defendant when instructions on future damages are not required for claims arising on and after 1/5/88 but before 4/09/03.

In comparative negligence trials, three-fourths of the jury must agree as to the causal negligence of both parties, and only those jurors who so find may participate in the apportionment of negligence. *O'Connell v. Chesapeake & Ohio O. R. Co.*, 58 Ohio St.3d 226 (1991), holds it is plain error to enter judgment for the plaintiff when the interrogatories answered by the jury disclosed that two jurors who did not agree on the negligence of the sole defendant and its proximate cause of the injury had joined in the apportionment of negligence and the damages.

In the case of *Dillon v. OhioHealth Corp.*, 10th Dist. Nos. 13AP-467, 14AP-259, 2015-Ohio-1389, *appeal not accepted*, 144 Ohio St.3d 1407, 2015-Ohio-4947, however, the court held that "a juror who failed to find negligence was still able

to determine proximate cause."

CV 403.01 Contributory fault: one defendant, interrogatories on future damages not required (claims arising on and after 4/9/03) *[Rev. 1/9/16]*

COMMENT

S.B. 120 defined the plaintiff's contributory conduct as "comparative fault" which applied from 4/9/03, through 4/6/05. S.B. 80, effective 4/7/05, defines the plaintiff's contributory conduct as "contributory fault." The substantive definitions are the same.

S.B. 120 provides that the negligence or other tortious conduct of the plaintiff or other persons who are not parties can reduce the damages available to a plaintiff who otherwise meets the burdens of proof and persuasion. R.C. 2315.33, R.C. 2315.34.

In jury trials of any negligence claim as defined in R.C. 2307.011(E) arising on and after 4/9/03, based on conduct occurring on or after that date and commenced on or after that date, in which the defendant asserts and establishes the affirmative defense of contributory negligence or the affirmative defense of implied assumption of the risk, the court must instruct the jury to return a general verdict accompanied by answers to interrogatories. See OJI-CV 403.05 for cases in which interrogatories are required for future damages.

R.C. 2315.34 requires jurors to "return a general verdict accompanied by answers to interrogatories," to determine the respective amounts of non-economic and economic damages, and to allocate liability among the plaintiff and defendants by percentages. R.C. 2315.35 then requires the court to "diminish the total amount of the compensatory damages that would have been recoverable by an amount that is proportionately equal to the percentage of negligence or other tortious conduct determined pursuant to section 2307.23 of the Revised Code that is attributable to the plaintiff." The Committee believes that the intent is that the court, rather than the jury, will allocate the plaintiff's recovery against a particular defendant according to whether the damages are non-economic or economic, and whether that defendant's allocable percentage of causation exceeds 50%, pursuant to R.C. 2307.22.

1. GENERAL.

(A) PLAINTIFF'S CONDUCT. The defendant claims that the plaintiff (was negligent) (impliedly assumed the risk of injury) (*describe other tortious conduct*). (The plaintiff was negligent if he/she failed to use that care for his/her own safety which a reasonably [cautious] [careful] [prudent] person would use under the same or similar circumstances.) (The plaintiff impliedly assumed the risk of injury if he/she had knowledge of a condition that was obviously dangerous to him/her, and voluntarily exposed himself/herself to that risk of injury.)

(B) OTHER PERSON'S CONDUCT. The defendant claims that plaintiff's (injury) (damages) were caused by the (negligence) (*describe tortious conduct*) of (*insert identity of other person*), who is a person from whom the plaintiff is not seeking recovery in this case.

COMMENT

The Committee believes that the General Assembly did not intend to include express or primary assumption of the risk as "other tortious conduct" in R.C. 2315.34, and that these remain complete defenses to a claim of negligence.

The definition of implied assumption of the risk is drawn from *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110, and *Briere v. Lathrop Co.*, 22 Ohio St.2d 166 (1970). See also *Cremeans v. Willmar Henderson Mfg. Co.*, 57 Ohio St.3d 145 (1991) (an employee does not voluntarily assume the risk of injury in the course of his/her employment when the risk must be encountered in the normal performance of his/her required job duties and responsibilities).

2. INTRODUCTION TO INTERROGATORIES. You will be given written questions called interrogatories. You must answer them in writing, starting with the first question. You must follow carefully the directions about how to proceed, because the directions will tell you what questions to answer and whether to sign the general verdict for the plaintiff or for the defendant.

A question is answered when at least (six) (three-fourths) of the jurors agree. All who agree must sign. If (six) (three-fourths) jurors cannot agree on an answer, you should report this to the court.

COMMENT

In comparative negligence trials, three-fourths of the jury must agree as to the causal negligence of both parties, and only those jurors who so find may participate in the apportionment of negligence. *O'Connell v. Chesapeake & Ohio O. R. Co.*, 58 Ohio St.3d 226 (1991), holds it is plain error to enter judgment for the plaintiff when the interrogatories answered by the jury disclosed that two jurors who did not agree on the negligence of the sole defendant and its proximate cause of the injury had joined in the apportionment of negligence and the damages.

In the case of *Dillon v. OhioHealth Corp.*, 10th Dist. Nos. 13AP-467, 14AP-259, 2015-Ohio-1389, *appeal not accepted*, 144 Ohio St.3d 1407, 2015-Ohio-4947, however, the court held that "a juror who failed to find negligence was still able to determine proximate cause."

3. INTERROGATORIES.

COMMENT

The following interrogatories are designed for only one plaintiff. If there is more than one plaintiff, a separate set of interrogatories should be used for each plaintiff.

Only those portions of the following interrogatories that are supported by some evidence should be used.

(A) WAS THE DEFENDANT NEGLIGENT?

CIRCLE YOUR ANSWER IN INK	YES or NO
.....	.....
.....	.....
.....	.....
.....	.....

(1) If the answer of (six) (three-fourths) or more jurors to (A) is "yes," move to Interrogatory (B). In answering the following Interrogatory (B) about whether the defendant's conduct was a direct and proximate cause of the plaintiff's (injury) (damages), only those jurors who answered "yes" to Interrogatory (A) are qualified to participate in answering Interrogatory (B).

(2) If the answer of (six) (three-fourths) or more jurors to (A) is "no,"

(a) do not answer the remaining Interrogatories, and

(b) sign the general verdict for the defendant, and

(c) report to the court that you have completed your deliberations.

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (A), report this to the court.

(B) WAS THE DEFENDANT'S NEGLIGENCE A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
.....	.....
.....	.....
.....	.....
.....	.....

(1) If the answer of (six) (three-fourths) or more jurors to (B) is "yes," move to Interrogatory (C).

(2) If the answer of (six) (three-fourths) or more jurors to (B) is "no,"

(a) do not answer the remaining Interrogatories, and

(b) sign the general verdict for the defendant, and

(c) report to the court that you have completed your deliberations

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (B), report this to the court.

(C) (WAS THE PLAINTIFF NEGLIGENT?) (DID THE PLAINTIFF IMPLIEDLY ASSUME THE RISK OF INJURY?) (DID THE PLAINTIFF [*describe other tortious conduct*]?)

CIRCLE YOUR ANSWER IN INK	YES or NO
.....	.....
.....	.....
.....	.....
.....	.....

(1) If the answer of (six) (three-fourths) or more jurors to (C) is "yes," move to Interrogatory (D). In answering the following Interrogatory (D) about whether the plaintiff's conduct was a direct and proximate cause of the plaintiff's (injury) (damages), only those jurors who answered "yes" to Interrogatory (C) are qualified to participate in answering Interrogatory (D).

(2) If the answer of (six) (three-fourths) or more jurors to (C) is "no," move to Interrogatory (E).

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (C), report this to the court.

(D) WAS THE PLAINTIFF'S (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (*DESCRIBE OTHER TORTIOUS CONDUCT*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
.....	.....
.....	.....
.....	.....
.....	.....

(1) If the answer of (six) (three-fourths) or more jurors to (D) is "yes" or "no" move to Interrogatory (E).

(2) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (D), report this to the court.

(E) (WAS THE [*INSERT IDENTITY OF NON-PARTY*] NEGLIGENT?) (DID THE [*INSERT IDENTITY OF NON-PARTY*] [*DESCRIBE OTHER TORTIOUS CONDUCT*]?)

CIRCLE YOUR ANSWER IN INK	YES or NO
. . . . .	. . . . .
. . . . .	. . . . .
. . . . .	. . . . .
. . . . .	. . . . .

(1) If the answer of (six) (three-fourths) or more jurors to (E) is "yes," move to Interrogatory (F). In answering the following Interrogatory (F) about whether the conduct of (insert identity of non-party) was a direct and proximate cause of the plaintiff's (injury) (damages), only those jurors who answered "yes" to Interrogatory (E) are qualified to participate in answering Interrogatory (F).

(2) If the answer of (six) (three-fourths) or more jurors to (E) is "no," move to Interrogatory (G).

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (E), report this to the court.

(F) WAS THE (NEGLIGENCE) (*DESCRIBE OTHER TORTIOUS CONDUCT*) OF (*INSERT IDENTITY OF NON-PARTY*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
. . . . .	. . . . .
. . . . .	. . . . .
. . . . .	. . . . .
. . . . .	. . . . .

(1) If the answer of (six) (three-fourths) or more jurors to (F) is "yes" or "no," move to Interrogatory (G).

(2) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (F), report this to the court.

(G) In answering the following Interrogatory (G) about the percentages of negligence that was a direct and proximate cause of the plaintiff's (injury) (damages), select one of the following alternatives:

(1) PLAINTIFF, DEFENDANT, AND (*INSERT IDENTITY OF NON-PARTY*) ALL RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), (D), (E), and (F), move to Interrogatory (G)(1). Only those jurors who answered "yes" to all six Interrogatories (A), (B), (C), (D), (E), and (F), are qualified to participate in answering Interrogatory (G)(1).

(2) ONLY PLAINTIFF AND DEFENDANT RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), and (D), move to Interrogatory (G)(2). Only those jurors who answered "yes" to Interrogatories (A), (B), (C), and (D) are qualified

to participate in answering Interrogatory (G)(2).

(3) ONLY DEFENDANT AND (*INSERT IDENTITY OF NON-PARTY*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (E), and (F), move to Interrogatory (G)(3). Only those jurors who answered "yes" to Interrogatories (A), (B), (E), and (F) are qualified to participate in answering Interrogatory (G)(3).

(4) If less than (six) (three-fourths) jurors are qualified to answer (G)(1), (G)(2), or (G)(3), report this to the court.

(G)(1) STATE THE PERCENTAGES OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) (*DESCRIBE OTHER TORTIOUS CONDUCT*) OF THE PLAINTIFF, NEGLIGENCE OF DEFENDANT, AND (NEGLIGENCE) (*DESCRIBE OTHER TORTIOUS CONDUCT*) OF OTHER PERSON(S) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES).

(a) ENTER PERCENTAGES.

(i) PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (*DESCRIBE OTHER TORTIOUS CONDUCT*) ATTRIBUTABLE TO THE PLAINTIFF: _____%

(ii) PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO THE DEFENDANT: _____%

(iii) PERCENTAGE OF (NEGLIGENCE) (*DESCRIBE TORTIOUS CONDUCT*) ATTRIBUTABLE TO THE FOLLOWING PERSON(S):

(*insert identity of other person*) _____%

COMMENT

The judge must identify every potentially liable person.

(iv) the percentages attributable to the plaintiff, the defendant, and the other person(s) must equal the total of:

100%

. . . . . .
. . . . . .
. . . . . .
. . . . . .

(b) If the percentage attributed to the plaintiff is 50% or less,

(i) move to Interrogatory (H), and all the jurors shall participate in the deliberations, and

(ii) sign the general verdict for the plaintiff.

(c) If the percentage attributable to the plaintiff is greater than 50%,

(i) do not answer Interrogatory (H), and

(ii) sign the general verdict for the defendant, and

(iii) report to the court that you have completed your deliberations.

(d) If (six) (three-fourths) jurors can not agree on an answer to interrogatory (G)(1), report this to the court.

(G)(2) STATE THE PERCENTAGES OF NEGLIGENCE OF DEFENDANT AND (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) (*DESCRIBE OTHER TORTIOUS CONDUCT*) OF THE PLAINTIFF THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES).

(a) ENTER PERCENTAGES.

(i) PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO THE DEFENDANT: _____%

(ii) PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) (*DESCRIBE OTHER TORTIOUS CONDUCT*) ATTRIBUTABLE TO THE PLAINTIFF: _____%

(iii) The percentages attributable to the defendant and the plaintiff must equal the total of:

100%

. . . . . .
. . . . . .
. . . . . .
. . . . . .

(b) If the percentage attributed to the plaintiff is 50% or less,

(i) move to Interrogatory (H), and all the jurors shall participate in the deliberations, and

(ii) sign the general verdict for the plaintiff.

(c) If the percentage attributable to the plaintiff is greater than 50%,

(i) do not answer Interrogatory (H), and

(ii) sign the general verdict for the defendant, and

(iii) report to the court that you have completed your deliberations.

(d) If (six) (three-fourths) jurors can not agree on an answer to interrogatory (G)(2), report this to the court.

(G)(3) STATE THE PERCENTAGES OF NEGLIGENCE OF DEFENDANT AND

(NEGLIGENCE) (*DESCRIBE OTHER TORTIOUS CONDUCT*) OF (*INSERT IDENTIFY OF NON-PARTY*) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES).

(a) ENTER PERCENTAGES.

(i) PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO THE DEFENDANT: _____%

(ii) PERCENTAGE OF (NEGLIGENCE) (*DESCRIBE OTHER TORTIOUS CONDUCT*) ATTRIBUTABLE TO THE FOLLOWING PERSON(S):

(*insert identity of other person*)_____%

COMMENT

The judge must identify every potentially liable person.

(iii) The percentages attributable to the defendant and other person(s) must equal the total of:

100%

. . . . . .

. . . . . .

. . . . . .

. . . . . .

(b) move to Interrogatory (H), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

(c) If (six) (three-fourths) jurors can not agree on an answer to interrogatory (G)(3) report this to the court.

(H) STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES TO THE PLAINTIFF WITHOUT REGARD TO THE PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (OR BOTH) ATTRIBUTED TO THE PLAINTIFF.

STATE YOUR ANSWER IN FIGURES IN INK $_____

. . . . . .

. . . . . .

. . . . . .

. . . . . .

COMMENT

The Committee believes that since the issues relating to damages are analyti-

cally different from those relating to causal negligence, the determination of damages may be made by all jurors without regard to their individual votes on causal negligence.

(I) PLEASE STATE THE FOLLOWING:

(1) THE PORTION OF THE COMPENSATORY DAMAGES THAT REPRESENTS ECONOMIC LOSS OF THE PLAINTIFF: $_____

(2) THE PORTION OF THE COMPENSATORY DAMAGES THAT REPRESENTS NON-ECONOMIC LOSS OF THE PLAINTIFF: $_____

(3) THE TOTAL AMOUNT OF THE COMPENSATORY DAMAGES SUSTAINED BY THE PLAINTIFF (TOTAL OF "ECONOMIC" AND "NON-ECONOMIC" LOSS): $_____

. . . . . .
. . . . . .
. . . . . .
. . . . . .

COMMENT

S.B. 120 requires that the jury distinguish between economic and non-economic damages. The distinction between economic and non-economic damages is significant, as different percentages of each may be recoverable against particular defendants, depending upon the allocation of liability. R.C. 2307.22, R.C. 2307.23.

4. COMPENSATORY DAMAGES. "Compensatory damages" include both economic and non-economic loss.

COMMENT

When plaintiff's claim for future damages exceeds $200,000, see OJI-CV 403.05.

5. ECONOMIC LOSS. R.C. 2307.011(C).

6. NON-ECONOMIC LOSS. R.C. 2307.011(F).

7. GENERAL VERDICT. OJI-CV 403.01 § 4 (claims arising before 1/5/88).

CV 403.03 Comparative negligence: more than one defendant (claims arising before 1/5/88) *[Rev. 1/9/16]*

COMMENT

See the introductory COMMENT at OJI-CV 403.01 (claims arising before 1/5/88). The instruction at OJI-CV 403.01 § 1 (claims arising before 1/5/88) will serve in cases with multiple defendants, provided the terms referring to the defendant are pluralized. If more than two defendants are involved, the interrogatories will have to be expanded. The interrogatories are designed for only one plaintiff. If there is more than one plaintiff claiming negligence, a separate set of interrogatories should be used for each plaintiff.

In comparative negligence trials, three-fourths of the jury must agree as to the causal negligence of both parties, and only those jurors who so find may participate in the apportionment of negligence. *O'Connell v. Chesapeake & Ohio O. R. Co.*, 58 Ohio St.3d 226 (1991), holds it is plain error to enter judgment for the plaintiff when the interrogatories answered by the jury disclosed that two jurors who did not agree on the negligence of the sole defendant and its proximate cause of the injury had joined in the apportionment of negligence and the damages.

In the case of *Dillon v. OhioHealth Corp.*, 10th Dist. Nos. 13AP-467, 14AP-259, 2015-Ohio-1389, *appeal not accepted*, 144 Ohio St.3d 1407, 2015-Ohio-4947, however, the court held that "a juror who failed to find negligence was still able to determine proximate cause."

1. GENERAL. OJI-CV 403.01 § 1 (claims arising before 1/5/88).

2. INTRODUCTION TO INTERROGATORIES. OJI-CV 403.01 § 2 (claims arising before 1/5/88).

3. INTERROGATORIES.

COMMENT

See COMMENT at OJI-CV 403.01 § 3 (claims arising before 1/5/88).

(A) WAS (*insert name of defendant 1*) NEGLIGENT?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of (six) (three-fourths) or more jurors to (A) is "yes," move to Interrogatory (B) and only those jurors who answered "yes" may participate.

If the answer of (six) (three-fourths) or more jurors to (A) is "no," sign the general verdict for (*insert name of defendant 1*), and move to Interrogatory (C).

If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (A), report this to the court.

(B) WAS THE NEGLIGENCE OF (*insert name of defendant 1*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of (six) (three-fourths) or more jurors to (B) is "yes," move to Interrogatory (C) and all jurors may participate.

If the answer of (six) (three-fourths) or more jurors to (B) is "no," sign the general verdict for (*insert name of defendant 1*), move to Interrogatory (C) and all jurors may participate.

If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (B), report this to the court.

(C) WAS (*insert name of defendant 2*) NEGLIGENT?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of (six) (three-fourths) or more jurors to (C) is "yes," move to Interrogatory (D) and only those jurors who answered "yes" to (C) may participate.

If the answer of (six) (three-fourths) or more jurors to (C) is "no," sign the general verdict for (*insert name of defendant 2*).

If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (C), report this to the court.

(D) WAS THE NEGLIGENCE OF (*insert name of defendant 2*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of (six) (three-fourths) or more jurors to (D) is "yes," move to Interrogatory (E) and all jurors may participate.

If the answer of (six) (three-fourths) or more jurors to (D) is "no," sign the general verdict for (*insert name of defendant 2*).

If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (D), report this to the court.

(E) (WAS THE PLAINTIFF NEGLIGENT?) (DID THE PLAINTIFF IMPLIEDLY ASSUME THE RISK OF INJURY?)

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of (six) (three-fourths) or more jurors to (E) is "yes," move to Interrogatory (F) and only those jurors who answered "yes" to (E) may participate.

If the answer of (six) (three-fourths) or more jurors to (E) is "no," move to Interrogatory (G) and only those six or more jurors who answered "yes" to both (B) and (D) may participate.

If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (E), report this to the court.

(F) WAS THE PLAINTIFF'S (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of (six) (three-fourths) or more jurors to (F) is "yes," move to Interrogatory (G) and only those jurors who answered "yes" to (F) may participate.

If the answer of (six) (three-fourths) or more jurors to (F) is "no," move to Interrogatory (H) and all jurors may participate.

If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (F), report this to the court.

(G) In answering the following Interrogatory (G) about the percentages of negligence that directly and proximately caused the plaintiff's (injury) (damages), select one of the following alternatives:

PLAINTIFF, DEFENDANT 1, AND DEFENDANT 2 ALL RESPONSIBLE FOR

PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), (D), (E), and (F), move to Interrogatory (G)(1). Only those jurors who answered "yes" to all six Interrogatories (A), (B), (C), (D), (E), and (F) are qualified to participate in answering Interrogatory (G)(1).

ONLY PLAINTIFF AND DEFENDANT 1 RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (E), and (F), move to Interrogatory (G)(2). Only those jurors who answered "yes" to Interrogatories (A), (B), (E), and (F) are qualified to participate in answering Interrogatory (G)(2).

ONLY PLAINTIFF AND DEFENDANT 2 RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (C), (D), (E), and (F) move to Interrogatory (G)(3). Only those jurors who answered "yes" to Interrogatories (C), (D), (E), and (F), are qualified to participate in answering Interrogatory (G)(3).

ONLY DEFENDANT 1 AND DEFENDANT 2 RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), and (D), move to Interrogatory (G)(4). Only those jurors who answered "yes" to Interrogatories (A), (B), (C), and (D) are qualified to participate in answering Interrogatory (G)(4).

If less than (six) (three-fourths) jurors are qualified to answer (G)(1), (G)(2), (G)(3), or (G)(4), report this to the court.

(G)(1) STATE THE PERCENTAGES OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) OF THE PLAINTIFF, NEGLIGENCE OF DEFENDANT 1, AND NEGLIGENCE OF DEFENDANT 2 THAT DIRECTLY AND PROXIMATELY CAUSED THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) ATTRIBUTABLE TO THE PLAINTIFF:	_____%
PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO THE DEFENDANT 1:	_____%
PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO THE DEFENDANT 2:	_____%
The percentages attributable to plaintiff, (*insert name of defendant 1*), and (*insert name of defendant 2*) must equal the total of	100%

. . . . . .
. . . . . .
. . . . . .
. . . . . .

If the percentage attributed to the plaintiff is 50% or less, move to Interrogatory (H), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

If the percentage attributable to the plaintiff is greater than 50%, do not answer

Interrogatory (H), and sign the general verdict for the (*insert names of defendants*), and report to the court that you have completed your deliberations.

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (G)(1), report this to the court.

(G)(2) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 1*) AND (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) OF THE PLAINTIFF THAT DIRECTLY AND PROXIMATELY CAUSED THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO THE (*insert name of defendant 1*)	_____%
PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) ATTRIBUTABLE TO THE PLAINTIFF:	_____%
The percentages attributable to (*insert name of defendant 1*) and plaintiff must equal the total of	100%

_____ _____

_____ _____

_____ _____

_____ _____

If the percentage attributed to the plaintiff is 50% or less, move to Interrogatory (H), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

If the percentage attributable to the plaintiff is greater than 50%, do not answer Interrogatory (H), and sign the general verdict for (*insert name of defendant 1*), and report to the court that you have completed your deliberations.

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (G)(2), report this to the court.

(G)(3) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 2*) AND (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) OF THE PLAINTIFF THAT DIRECTLY AND PROXIMATELY CAUSED THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO THE (*insert name of defendant 2*)	_____%
PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) ATTRIBUTABLE TO THE PLAINTIFF:	_____%
The percentages attributable to (*insert name of defendant 2*) and plaintiff must equal the total of	100%

_____ _____

_____ _____

_____ _____

_____ _____

If the percentage attributed to the plaintiff is 50% or less, move to Interrogatory (H), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

If the percentage attributable to the plaintiff is greater than 50%, do not answer Interrogatory (H), and sign the general verdict for (*insert name of defendant 2)*, and report to the court that you have completed your deliberations.

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (G)(3) report this to the court.

(G)(4) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 1*) AND (NEGLIGENCE) OF (*insert name of defendant 2*) THAT DIRECTLY AND PROXIMATELY CAUSED THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO (*insert name of defendant 1*):	_____%
PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO (*insert name of defendant 2*):	_____%
The percentages attributable to (*insert names of defendants*) must equal the total of	100%

_____ _____

_____ _____

_____ _____

move to Interrogatory (H), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (G)(4), report this to the court.

(H) STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES TO THE PLAINTIFF WITHOUT REGARD TO THE PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (OR BOTH) ATTRIBUTED TO THE PLAINTIFF.

STATE YOUR ANSWER IN FIGURES IN INK	$ _____
. . . . .	. . . . .
. . . . .	. . . . .
. . . . .	. . . . .
. . . . .	. . . . .

4. GENERAL VERDICT.

COMMENT

The Committee believes that five separate verdict forms should be used and explained to the jury.

(A) WE, THE JURY, DO HEREBY FIND FOR THE PLAINTIFF AND AGAINST (*insert name of defendant 1*), AND WE FIND THAT THE TOTAL AMOUNT OF COMPENSATORY DAMAGES IS $ _____, AS DECIDED IN INTERROGATORY (H).

_____ _____
_____ _____
_____ _____
_____ _____

(B) WE, THE JURY, DO HEREBY FIND FOR THE PLAINTIFF AND AGAINST (*insert name of defendant 2*), AND WE FIND THAT THE TOTAL AMOUNT OF COMPENSATORY DAMAGES IS $ _____, AS DECIDED IN INTERROGATORY (H).

_____ _____
_____ _____
_____ _____
_____ _____

(C) WE, THE JURY, DO HEREBY FIND FOR THE PLAINTIFF AND AGAINST (*insert name of defendant 1*) AND (*insert name of defendant 2*), AND WE FIND THAT THE TOTAL AMOUNT OF COMPENSATORY DAMAGES IS $ _____, AS DECIDED IN INTERROGATORY (H).

_____ _____
_____ _____
_____ _____
_____ _____

(D) WE, THE JURY, DO HEREBY FIND FOR (*insert name of defendant 1*).

_____ _____
_____ _____
_____ _____
_____ _____

(E) WE, THE JURY, DO HEREBY FIND FOR (*insert name of defendant 2*).

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

It is error if the jury does not return a general verdict, regardless of whether interrogatories are also answered. Calmes v. Goodyear Tire & Rubber Co., 61 Ohio St.3d 470 (1991).

R.C. 2315.18 requires that the general verdict determine the amount of the recovery. R.C. 2315.19(C) requires the court to diminish the total compensatory damages by the percentage of negligence attributable to the plaintiff.

CV 403.03 Comparative negligence: more than one defendant, interrogatories on future damages not required (claims arising on and after 1/5/88 but before 4/9/03) *[Rev. 1/9/16]*

COMMENT

In jury trials of any negligence claim as defined in R.C.2315.19(E)(2) (including any negligence aspect of medical and allied claims as defined in R.C.2305.11(D)) arising on or after 1/5/88, based on conduct occurring on or after that date, in which the defendant asserts and with sufficient evidence to submit the issue to the jury establishes the affirmative defense of contributory negligence or the affirmative defense of implied assumption of the risk, the court must instruct the jury to return a general verdict accompanied by answers to interrogatories. R.C. 2315.19(B).

The following instruction applies to claims arising on or after 1/5/88 where there is more than one defendant but Interrogatories on future damages are not required either because the plaintiff does not make a good faith claim for future damages in excess of $200,000 or because no party makes a motion requesting interrogatories on future damages. R.C. 2323.56.

See the introductory COMMENT at OJI-CV 403.01 (claims arising before 1/5/88). The instruction at OJI-CV 403.01 § 1 (claims arising before 1/5/88) will serve in cases with multiple defendants, provided the terms referring to the defendant are pluralized. If more than two defendants are involved, the interrogatories will have to be expanded. The interrogatories are designed for only one plaintiff. If there is more than one plaintiff claiming negligence, a separate set of interrogatories should be used for each plaintiff.

1. GENERAL. OJI-CV 403.03 § 1 (claims arising before 1/5/88).

2. INTRODUCTION TO INTERROGATORIES. OJI-CV 403.01 § 2 (claims arising before 1/5/88).

COMMENT

In comparative negligence trials, three-fourths of the jury must agree as to the causal negligence of both parties, and only those jurors who so find may participate in the apportionment of negligence. *O'Connell v. Chesapeake & Ohio O. R. Co.*, 58 Ohio St.3d 226 (1991), holds it is plain error to enter judgment for the plaintiff when the interrogatories answered by the jury disclosed that two jurors who did not agree on the negligence of the sole defendant and its proximate cause of the injury had joined in the apportionment of negligence and the damages.

In the case of *Dillon v. OhioHealth Corp.*, 10th Dist. Nos. 13AP-467, 14AP-259, 2015-Ohio-1389, *appeal not accepted*, 144 Ohio St.3d 1407, 2015-Ohio-4947, however, the court held that "a juror who failed to find negligence was still able to determine proximate cause."

3. INTERROGATORIES. OJI-CV 403.03 § 3 (claims arising before 1/5/88).

COMMENT

Interrogatories (A) through (H) and the directions to the jury applicable to those interrogatories are identical to those set forth in OJI-CV 403.03 § 3 (claims arising before 1/5/88) and the COMMENTS therein are applicable. Use those eight Interrogatories and then Interrogatory (I) as follows.

(A) OJI-CV 403.03 § 3 (A) (claims arising before 1/5/88).

(B) OJI-CV 403.03 § 3 (B) (claims arising before 1/5/88).

(C) OJI-CV 403.03 § 3 (C) (claims arising before 1/5/88).

(D) OJI-CV 403.03 § 3 (D) (claims arising before 1/5/88).

(E) OJI-CV 403.03 § 3 (E) (claims arising before 1/5/88).

(F) OJI-CV 403.03 § 3 (F) (claims arising before 1/5/88).

(G) OJI-CV 403.03 § 3 (G) (claims arising before 1/5/88).

(H) OJI-CV 403.03 § 3 (H) (claims arising before 1/5/88).

If you have attributed (some negligence) (some implied assumption of the risk) (or both) to the plaintiff but in a percentage of 50% or less and attributed a percentage of negligence greater than zero to (*insert name of defendant 1*) and a percentage of negligence greater than zero to (*insert name of defendant 2*), then answer the following Interrogatory (I).

(I) STATE THE PORTION, IF ANY, OF THE TOTAL COMPENSATORY DAMAGES IN YOUR ANSWER TO INTERROGATORY (H) THAT IS ECONOMIC LOSS TO THE PLAINTIFF AND THE PORTION, IF ANY, THAT IS NONECONOMIC LOSS TO THE PLAINTIFF:

ECONOMIC LOSS TO THE PLAINTIFF $_____

NONECONOMIC LOSS TO THE PLAINTIFF $_____

The total of these amounts must equal your answer to Interrogatory (H).

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

Note that R.C. 2315.19 does not change the doctrine of joint and several liability unless (1) the plaintiff was causally negligent or impliedly assumed the risk, (2) the plaintiff is still entitled to recover some damages, and (3) *both* defendants were causally negligent. R.C.2315.19(D)(1).

For instructions on "economic" and "noneconomic" loss, see OJI-CV 403.03 § 5, below.

4. INTERROGATORIES: WITH VICARIOUS LIABILITY.

COMMENT

If there are two or more defendants and "an issue of vicarious liability *** exists relative to those parties," then for purposes of determining the percentages of negligence and implied assumption of the risk, the jury must be instructed that those defendants shall be treated as a single party to the extent that any vicarious liability is determined to exist between them. R.C. 2315.19(B)(4). If vicarious liability is admitted or established as a matter of law, there is no factual issue for the jury to determine.

The Committee believes that because the issues relating to damages and vicarious liability are analytically different from those relating to causal negligence, the determination of damages and vicarious liability may be made by all jurors without regard to their individual votes on causal negligence.

(J) WAS (*insert name of alleged agent/employee*) AN (AGENT) (EMPLOYEE) OF (*insert name of alleged principal/employer*) AND WITHIN THE SCOPE OF HIS/HER (AGENCY) (EMPLOYMENT) AT THE TIME (*insert name of alleged agent/employee*) (ACTED) (FAILED TO ACT) (*describe conduct*).

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer to (J) is "yes," sign the general verdict for the plaintiff and against both defendants, and report to the court that you have completed your deliberations.

If the answer to (J) is "no," and the answer to Interrogatories (A) and (B) were "yes," sign the general verdict for the plaintiff and against (insert name of alleged agent/employee), and sign the general verdict for (insert name of alleged principal/ employer), and report to the court that you have completed your deliberations.

If six jurors cannot agree on an answer to Interrogatory (J), report this to the court.

5. ECONOMIC AND NONECONOMIC LOSS. Compensatory damages include both economic and noneconomic loss. "Economic loss" means lost wages, salaries and other compensation (earning capacity) (fringe benefits). It also means (expenditures) (expenses) (costs) for medical care or treatment, rehabilitation services, or other care, treatment, services, products or accommodations and all other (expenditures) (expenses) (costs) brought on by the (injury) (death) (loss to person or property). "Noneconomic loss" means harm or loss not normally measured in money, including but not limited to pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, mental anguish, and any other intangible loss. "Consortium" consists of (services) (sexual relations) (companionship) (comfort) (solace) (love) of a person's spouse.

COMMENT

Drawn from R.C. 2315.19(E)(1) and (3) in effect prior to 4/9/03.

6. VICARIOUS LIABILITY. OJI-CV 537.07.

7. GENERAL VERDICT: NO VICARIOUS LIABILITY. OJI-CV 403.03 § 4 (claims arising before 1/5/88).

8. GENERAL VERDICT: WITH VICARIOUS LIABILITY.

COMMENT

The Committee believes that three separate verdict forms should be used and explained to the jury.

WE, THE JURY, DO HEREBY FIND FOR THE PLAINTIFF AND AGAINST

(*insert name of alleged agent/employee*), BUT FOR (*insert name of alleged principal/employer*), AND WE DO FIND THAT THE TOTAL AMOUNT OF COMPENSATORY DAMAGES IS $_____, AS DECIDED IN INTERROGATORY (H).

_____ _____
_____ _____
_____ _____
_____ _____

WE, THE JURY, DO HEREBY FIND FOR THE PLAINTIFF AND AGAINST (*insert name of alleged agent/employee*) and (*insert name of alleged principal/employer*), AND WE FIND THAT THE TOTAL AMOUNT OF COMPENSATORY DAMAGES IS $_____, AS DECIDED IN INTERROGATORY (H).

_____ _____
_____ _____
_____ _____
_____ _____

WE, THE JURY, DO HEREBY FIND IN FAVOR OF (*insert name of alleged agent/employee*) AND (*insert name of alleged principal/employer*).

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

It is error if the jury does not return a general verdict, whether or not interrogatories are also answered. Calmes v. Goodyear Tire & Rubber Co., 61 Ohio St.3d 470 (1991).

R.C. 2315.18 requires that the general verdict determine the amount of the recovery. R.C. 2315.19(C) requires the court to diminish the total compensatory damages by the percentage of negligence attributable to the plaintiff. The Committee believes that R.C. 2315.19(C) is more specific and controls, and that the judge should adjust total compensatory damages by the plaintiff's percentage.

CV 403.03 Comparative fault: more than one defendant, interrogatories on future damages not required (claims arising on and after 4/9/03) *[Rev. 1/9/16]*

COMMENT

See the introductory COMMENT at OJI-CV 403.03 (claims arising before 1/5/88) and OJI-CV 403.01 (claims arising on and after 4/9/03). The instruction at OJI-CV 403.01 § 1 (claims arising on and after 4/9/03) will serve in cases with multiple defendants, provided the terms referring to the defendant are pluralized. If more than two defendants or potentially liable persons are involved, the interrogatories will have to be expanded. The interrogatories are designed for only one plaintiff. If there is more than one plaintiff claiming negligence, a separate set of interrogatories should be used for each plaintiff.

In comparative negligence trials, three-fourths of the jury must agree as to the causal negligence of both parties, and only those jurors who so find may participate in the apportionment of negligence. *O'Connell v. Chesapeake & Ohio O. R. Co.*, 58 Ohio St.3d 226 (1991), holds it is plain error to enter judgment for the plaintiff when the interrogatories answered by the jury disclosed that two jurors who did not agree on the negligence of the sole defendant and its proximate cause of the injury had joined in the apportionment of negligence and the damages.

In the case of *Dillon v. OhioHealth Corp.*, 10th Dist. Nos. 13AP-467, 14AP-259, 2015-Ohio-1389, *appeal not accepted*, 144 Ohio St.3d 1407, 2015-Ohio-4947, however, the court held that "a juror who failed to find negligence was still able to determine proximate cause."

1. GENERAL.

(A) PLAINTIFF'S CONDUCT. The defendant(s) claim(s) that the plaintiff (was negligent) (impliedly assumed the risk of injury) (*describe other tortious conduct*). (The plaintiff was negligent if he/she failed to use that care for his/her own safety which a reasonably [cautious] [careful] [prudent] person would use under the same or similar circumstances.) (The plaintiff impliedly assumed the risk of injury if he/she had knowledge of a condition that was obviously dangerous to him/her, and voluntarily exposed himself/herself to that risk of injury.)

(B) OTHER PERSON'S CONDUCT. The defendant(s) claim(s) that plaintiff's (injury) (damages) were caused by the (negligence) (*describe tortious conduct*) of (*insert identity of other person*), who is a person from whom the plaintiff is not seeking recovery in this case.

COMMENT

See COMMENT after OJI-CV 403.01 § 1 (claims arising on and after 4/9/03).

2. INTRODUCTION TO INTERROGATORIES. OJI-CV 403.01 § 2 (claims arising on and after 4/9/03).

3. INTERROGATORIES.

COMMENT

Interrogatories (A) through (D) and the directions to the jury applicable to those interrogatories are identical to those set forth in OJI-CV 403.03 § 3 (claims arising before 1/5/88) and the COMMENTS therein are applicable. Use those four Interrogatories and then Interrogatory (E) and (F) as follows.

(A) OJI-CV 403.03 § 3 (A) (claims arising before 1/5/88).

(B) OJI-CV 403.03 § 3 (B) (claims arising before 1/5/88).

(C) OJI-CV 403.03 § 3 (C) (claims arising before 1/5/88).

(D) OJI-CV 403.03 § 3 (D) (claims arising before 1/5/88).

(E) (WAS THE PLAINTIFF NEGLIGENT?) (DID THE PLAINTIFF IMPLIEDLY ASSUME THE RISK OF INJURY?) (DID THE PLAINTIFF [*DESCRIBE OTHER TORTIOUS CONDUCT*]?)

CIRCLE YOUR ANSWER IN INK	YES or NO

If the answer of (six) (three-fourths) or more jurors to (E) is "yes," move to Interrogatory (F) and only those jurors who answered "yes" to (E) may participate.

If the answer of (six) (three-fourths) or more jurors to (E) is "no," move to Interrogatory (G).

If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (E), report this to the court.

(F) WAS THE PLAINTIFF'S (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (*DESCRIBE OTHER TORTIOUS CONDUCT*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO

If the answer of (six) (three-fourths) or more jurors to (F) is "yes" or "no," move to Interrogatory (G).

If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (F), report this to the court.

(G) (WAS THE [*insert identity of non-party*] NEGLIGENT?) (DID THE [*insert identity of non-party*] [*describe other tortious conduct*]?)

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of (six) (three-fourths) or more jurors to (G) is "yes," move to Interrogatory (H).

If the answer of (six) (three-fourths) or more jurors to (G) is "no," move to Interrogatory (I).

If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (G), report this to the court.

In answering the following Interrogatory (H) about whether the conduct of (*insert identify of non-party*) was a direct and proximate caused of the plaintiff's (injury) (damages), only those jurors who answered "yes" to Interrogatory (G) are qualified to participate in answering Interrogatory (H).

(H) WAS THE (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of (six) (three-fourths) or more jurors to (H) is "yes," move to Interrogatory (I).

If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (H), report this to the court.

(I) In answering the following Interrogatory (I) about the percentages of negligence that was a direct and proximate cause of the plaintiff's (injury) (damages), select one of the following alternatives:

PLAINTIFF, (*insert name of defendant 1*), (*insert name of defendant 2*), AND (*insert identity of non-party*) ALL RESPONSIBLE FOR PLAINTIFF'S INJURY. If

(six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), (D), (E), (F), (G), and (H), move to Interrogatory (I)(1). Only those jurors who answered "yes" to all eight Interrogatories (A), (B), (C), (D), (E), (F), (G), and (H) are qualified to participate in answering Interrogatory (I)(1).

PLAINTIFF, (*insert name of defendant 1*), AND (*insert name of defendant 2*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), (D), (E), and (F), move to Interrogatory (I)(2). Only those jurors who answered "yes" to Interrogatories (A), (B), (C), (D), (E), and (F) are qualified to participate in answering Interrogatory (I)(2).

ONLY PLAINTIFF AND (*insert name of defendant 1*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (E), and (F), move to Interrogatory (I)(3). Only those jurors who answered "yes" to Interrogatories (A), (B), (E), and (F) are qualified to participate in answering Interrogatory (I)(3).

ONLY PLAINTIFF AND (*insert name of defendant 2*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (C), (D), (E), and (F), move to Interrogatory (I)(4). Only those jurors who answered "yes" to Interrogatories (C), (D), (E), and (F) are qualified to participate in answering Interrogatory (I)(4).

ONLY (*insert name of defendant 1*), (*insert name of defendant 2*), AND (*insert identity of non-party*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), (D), (G), and (H), move to Interrogatory (I)(5). Only those jurors who answered "yes" to Interrogatories (A), (B), (C), (D), (G), and (H) are qualified to participate in answering Interrogatory (I)(5).

ONLY (*insert name of defendant 1*) AND (*insert name of defendant 2*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), and (D), move to Interrogatory (I)(6). Only those jurors who answered "yes" to Interrogatories (A), (B), (C), and (D) are qualified to participate in answering Interrogatory (I)(6).

ONLY (*insert name of defendant 1*) AND (*insert identity of non-party*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (G), and (H), move to Interrogatory (I)(7). Only those jurors who answered "yes" to Interrogatories (A), (B), (G), and (H) are qualified to participate in answering Interrogatory (I)(7).

ONLY (*insert name of defendant 2*) AND (*insert identity of non-party*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (C), (D), (G), and (H), move to Interrogatory (I)(8). Only those jurors who answered "yes" to Interrogatories (C), (D), (G), and (H) are qualified to participate in answering Interrogatory (I)(8).

If less than (six) (three-fourths) jurors are qualified to answer (I)(1), (I)(2), (I)(3),

(I)(4), (I)(5), (I)(6), (I)(7), or (I)(8), report this to the court.

(I)(1) STATE THE PERCENTAGES OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) (*describe other tortious conduct*) OF THE PLAINTIFF, NEGLIGENCE OF (*insert name of defendant 1*), NEGLIGENCE OF (*insert name of defendant 2*) AND (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (*describe other tortious conduct*) OF THE PLAINTIFF:	_____%
PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 1*):	_____%
PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 2*):	_____%
PERCENTAGE OF (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*):	_____%

COMMENT

The judge must identify every potentially liable person.

The percentages attributable to the plaintiff, the defendants, and the non-party must equal the total of	100%

_____ _____

_____ _____

_____ _____

_____ _____

If the percentage attributed to the plaintiff is 50% or less, move to Interrogatory (J), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

If the percentage attributable to the plaintiff is greater than 50%, do not answer Interrogatory (J), and sign the general verdicts for the defendants, and report to the court that you have completed your deliberations.

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (I)(1) report this to the court.

(I)(2) STATE THE PERCENTAGES OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) (*describe other tortious conduct*) OF THE PLAINTIFF, NEGLIGENCE OF (*insert name of defendant 1*), AND NEGLIGENCE OF (*insert name of defendant 2*) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (*describe other tortious conduct*) OF THE PLAINTIFF:	_____%

PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 1*):	_____%
PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 2*):	_____%

COMMENT

The judge must identify every potentially liable person.

The percentages attributable to the plaintiff and the defendants must equal the total of	100%

_____ _____

_____ _____

_____ _____

_____ _____

If the percentage attributed to the plaintiff is 50% or less, move to Interrogatory (J), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

If the percentage attributable to the plaintiff is greater than 50%, do not answer Interrogatory (J), and sign the general verdicts for the defendants, and report to the court that you have completed your deliberations.

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (I)(2) report this to the court.

(I)(3) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 1*) AND (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) (*describe other tortious conduct*) OF THE PLAINTIFF THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 1*)	_____%
PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) (*describe other tortious conduct*) OF THE PLAINTIFF:	_____%
The percentages attributable to the plaintiff and (*insert name of defendant 1*) must equal the total of	100%

_____ _____

_____ _____

_____ _____

_____ _____

If the percentage attributed to the plaintiff is 50% or less, move to Interrogatory (J), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

If the percentage attributable to the plaintiff is greater than 50%, do not answer

Interrogatory (J), and sign the general verdict for (*insert name of defendant 1*), and report to the court that you have completed your deliberations.

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (I)(3), report this to the court.

(I)(4) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 2*) AND (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) (*describe other tortious conduct*) OF THE PLAINTIFF THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 2*)	_____%
PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) (*describe other tortious conduct*) OF THE PLAINTIFF:	_____%
The percentages attributable to the plaintiff and (*insert name of defendant 2*) must equal the total of	100%

_____ _____

_____ _____

_____ _____

_____ _____

If the percentage attributed to the plaintiff is 50% or less, move to Interrogatory (J), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

If the percentage attributable to the plaintiff is greater than 50%, do not answer Interrogatory (J), and sign the general verdict for (*insert name of defendant 2*), and report to the court that you have completed your deliberations.

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (I)(4), report this to the court.

(I)(5) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 1*), NEGLIGENCE OF (*insert name of defendant 2*), AND (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 1*)	_____%
PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 2*)	_____%
PERCENTAGE OF (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*):	_____%
The percentages attributable to the defendants and the non-party must equal the total of	100%

_____ _____

_____ _____

_____ _____

_____ _____

move to Interrogatory (J), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (I)(5), report this to the court.

(I)(6) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 1*) AND NEGLIGENCE of (*insert name of defendant 2*) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 1*):	_____%
PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 2*):	_____%
The percentages attributable to the defendants must equal the total of	100%

_____ _____
_____ _____
_____ _____
_____ _____

move to Interrogatory (J), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (I)(6), report this to the court.

(I)(7) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 1*) AND (NEGLIGENCE) (*describe other tortious conduct*) of (*insert identity of non-party*) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 1*):	_____%
PERCENTAGE OF (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*):	_____%
The percentages attributable to (*insert name of defendant 1*) and (*insert identity of non-party*) must equal the total of	100%

_____ _____
_____ _____
_____ _____
_____ _____

move to Interrogatory (J), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (I)(7), report this to the court.

(I)(8) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 2*) AND (NEGLIGENCE) (*describe other tortious conduct*) of (*insert identity of non-party*) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 2*):	_____%
PERCENTAGE OF (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*):	_____%
The percentages attributable to (*insert name of defendant 2*) and (*insert identity of non-party*) must equal the total of	100%

_____ _____

_____ _____

_____ _____

_____ _____

move to Interrogatory (J), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (I)(8), report this to the court.

(J) STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES TO THE PLAINTIFF WITHOUT REGARD TO THE PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (OR BOTH) ATTRIBUTED TO THE PLAINTIFF.

STATE YOUR ANSWER IN FIGURES IN INK $ _____

_____ _____

_____ _____

_____ _____

_____ _____

COMMENT

The Committee believes that because the issues relating to damages are analytically different from those relating to causal negligence, the determination of damages may be made by all jurors without regard to their individual votes on causal negligence.

(K) PLEASE STATE THE FOLLOWING:

(1) THE PORTION OF THE COMPENSATORY DAMAGES THAT REPRESENTS ECONOMIC LOSS OF THE PLAINTIFF: . . . . . .
$_____

(2) THE PORTION OF THE COMPENSATORY DAMAGES THAT REPRESENTS NON-ECONOMIC LOSS OF THE PLAINTIFF: . . . . . $_____

(3) THE TOTAL AMOUNT OF THE COMPENSATORY DAMAGES SUSTAINED BY THE PLAINTIFF (TOTAL OF "ECONOMIC" AND "NON-ECONOMIC" LOSS): . . . . . $_____

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

S.B. 120 requires that the jury distinguish between economic and non-economic damages. The distinction between economic and non-economic damages is significant, as different percentages of each may be recoverable against particular defendants, depending upon the allocation of liability. R.C. 2307.22, R.C. 2307.23.

4. COMPENSATORY DAMAGES. OJI-CV 403.01 § 4 (claims arising on and after 4/9/03).

COMMENT

When plaintiff's claim for future damages exceeds $200,000, see OJI-CV 403.05 (claims on and after 1/5/88 but before 4/9/03).

5. ECONOMIC LOSS. R.C. 2307.011(C).

6. NON-ECONOMIC LOSS. R.C. 2307.011(F).

7. GENERAL VERDICT. OJI-CV 403.03 § 4 (claims arising before 1/5/88).

CV 403.05 Comparative negligence: one defendant, interrogatories on future damages required (claims arising on and after 1/5/88 but before 4/9/03) ***[Rev. 5-14-05]***

COMMENT

In jury trials of any negligence claim as defined in R.C. 2315.19(E)(2) (including any negligence aspect of medical and allied claims as defined in R.C. 2305.11(D)) arising on or after January 5, 1988 but before April 9, 2003, based on conduct occurring on or after that date, in which the defendant asserts and with sufficient evidence to submit the issue to the jury establishes the affirmative

defense of contributory negligence or the affirmative defense of implied assumption of the risk, the court must instruct the jury to return a general verdict accompanied by answers to interrogatories. R.C. 2315.19(B).

(Text continued on page 181)

Under the version of R.C. 2323.56, effective January 5, 1988, if that negligence claim is for damages for injury to person and is thus a tort action as defined in R.C. 2323.56(A)(6), and if the plaintiff makes a good faith claim for future damages in excess of $200,000, the court must, on motion of the plaintiff or the defendant in question, submit Interrogatories under R.C. 2323.56(B), in addition to those required by R.C. 2315.34. To the extent that the plaintiff asserts a medical or allied claim as defined in R.C. 2305.11(D), R.C. 2323.57 applies rather than R.C. 2323.56. To the extent that the plaintiff asserts a tort action against a political subdivision under R.C. Chapter 2744, R.C. 2323.56 does not apply. R.C. 2323.56(H).

For negligence cases involving future damages, but no comparative negligence, see OJI-CV 315.09.

1. GENERAL. OJI-CV 403.01 § 1 (claims arising before 1/5/88).
2. INTRODUCTION TO INTERROGATORIES. OJI-CV 403.01 § 2 (claims arising before 1/5/88).
3. INTERROGATORIES. OJI-CV 403.01 § 3 (claims arising before 1/5/88).

COMMENT

The following interrogatories address only negligence claims as defined in R.C. 2315.34 which are also tort actions as defined in R.C. 2323.56(A)(6) and which are not excepted by R.C. 2323.56(H). Interrogatories (A) through (E) are identical to those set forth at OJI-CV 403.01 § 3 (claims arising before 1/5/88), and the COMMENTS therein are applicable. Use those Interrogatories and then Interrogatories (F), (G), (H), (I), (J), and (K) as follows.

(A) OJI-CV 403.01 § 3 (A) (claims arising before 1/5/88).

(B) OJI-CV 403.01 § 3 (B) (claims arising before 1/5/88).

(C) OJI-CV 403.01 § 3 (C) (claims arising before 1/5/88).

(D) OJI-CV 403.01 § 3 (D) (claims arising before 1/5/88).

(E) OJI-CV 403.01 § 3 (E) (claims arising before 1/5/88).

(F) STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES, PAST AND FUTURE, SUFFERED BY THE PLAINTIFF WITHOUT REGARD TO THE PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (OR BOTH) ATTRIBUTED TO THE PLAINTIFF.

STATE YOUR ANSWER IN INK $ _____

_____ _____

_____ _____
_____ _____
_____ _____

Move to Interrogatory (G).

If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (F), report this to the court.

COMMENT

The Committee believes that since all the issues relating to damages and the separation into past and future damages are analytically different from those relating to causal negligence, the determination of all those issues may be made by all jurors without regard to their individual votes on causal negligence.

(G) WHAT PORTION OF YOUR ANSWER TO INTERROGATORY (F) IS PAST DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF?

STATE YOUR ANSWER IN INK $ _____

_____ _____
_____ _____
_____ _____
_____ _____

If you find that there are past damages, move to Interrogatory (H).

If you find that there are not past damages, move to Interrogatory (I).

(H) WHAT ARE THE PORTIONS OF THE PAST DAMAGES SHOWN IN YOUR ANSWER TO INTERROGATORY (G) THAT FALL INTO THE FOLLOWING:

(1) PAST ECONOMIC LOSS ..... $_____

(2) PAST NONECONOMIC LOSS ..... $_____

The total of these two amounts must equal your answer to Interrogatory (G).

_____ _____
_____ _____
_____ _____
_____ _____

Move to Interrogatory (I).

(I) WHAT PORTION OF YOUR ANSWER TO INTERROGATORY (F) IS

FUTURE DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF?

STATE YOUR ANSWER IN INK $ _____

_____ _____

_____ _____

_____ _____

_____ _____

If you find that there are future damages, move to Interrogatory (J).

If you find that there are no future damages, do not answer the remaining Interrogatories, complete the verdict form for plaintiff and report to the court that you have completed your deliberations.

(J) WHAT ARE THE PORTIONS OF THE FUTURE DAMAGES SHOWN IN YOUR ANSWER TO INTERROGATORY (I) THAT FALL INTO THE FOLLOWING:

(1) FUTURE ECONOMIC LOSS ..... $_____

(2) FUTURE NONECONOMIC LOSS ..... $_____

The total of these two amounts must equal your answer to Interrogatory (I).

_____ _____

_____ _____

_____ _____

If you find that there is future economic loss, move to Interrogatory (K).

If you find that there is no future economic loss, do not answer Interrogatory (K), complete the verdict form for plaintiff and report to the court that you have completed your deliberations.

(K) WHAT ARE THE PORTIONS, IF ANY, OF FUTURE ECONOMIC LOSS SHOWN IN YOUR ANSWER TO INTERROGATORY (J) THAT FALL INTO THE FOLLOWING:

(1) WAGES, SALARIES OR OTHER LOST COMPENSATION (EARNING CAPACITY) (FRINGE BENEFITS) ..... $_____

(2) (EXPENDITURES) (EXPENSES) (COSTS) FOR MEDICAL CARE OR TREATMENT, REHABILITATION SERVICES, OR OTHER CARE, TREATMENT, SERVICES, PRODUCTS, OR ACCOMMODATIONS ..... $_____

(3) ANY OTHER (EXPENDITURES) (EXPENSES) (COSTS) ..... $_____

The total of future economic loss must equal your answer to Interrogatory (J).

TOTAL ..... $_____

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

Drawn from R.C. 2323.56(B)(1).

4. PAST AND FUTURE DAMAGES. Damages that (result from) (are caused by) injury to the person are divided into past and future damages. Past damages are those that have accrued up to the time you reach your verdict. Future damages are those that are reasonably certain to occur after you reach your verdict.

COMMENT

Drawn from R.C. 2323.56(A)(2).

5. ECONOMIC AND NONECONOMIC LOSS. Compensatory damages include both economic and noneconomic loss. "Economic loss" means lost wages, salaries and other compensation (earning capacity) (fringe benefits). It also means (expenditures) (expenses) (costs) for medical care or treatment, rehabilitation services, or other care, treatment, services, products or accommodations and all other (expenditures) (expenses) (costs) brought on by the (injury) (death) (loss to person or property). "Noneconomic loss" means harm or loss not normally measured in money, including but not limited to pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, mental anguish, and any other intangible loss. "Consortium" consists of (services) (sexual relations) (companionship) (comfort) (solace) (love) of a person's spouse.

COMMENT

Drawn from R.C. 2315.19(E)(1) and (3) in effect prior to 4/9/03.

6. FUTURE DAMAGES: COST OF ANNUITY (OPTIONAL). OJI-CV 315.13.

7. GENERAL VERDICT. OJI-CV 403.01 § 4 (claims arising before 1/5/88).

CV 403.05 Comparative fault: one defendant, interrogatories on future damages required (claims arising on and after 4/9/03) *[Rev. 12-11-05]*

COMMENT

S.B. 120 provides that the negligence or other tortious conduct of the plaintiff or other persons who are not parties can reduce the damages available to a plaintiff who otherwise meets the burdens of proof and persuasion. R.C. 2315.33, 2315.34.

In jury trials of any negligence claim as defined in R.C. 2307.011(E) arising on or after April 9, 2003, based on conduct occurring on or after that date and commenced on and after that date, in which the defendant asserts and establishes the affirmative defense of contributory negligence or the affirmative defense of implied assumption of the risk, the court must instruct the jury to return a general verdict accompanied by answers to interrogatories. R.C. 2315.34.

If that negligence claim is for damages for injury to person and is thus a tort action as defined in R.C. 2323.56(A)(6), and if the plaintiff makes a good faith claim for future damages in excess of $200,000, the court must, on motion of the plaintiff or the defendant, submit Interrogatories under R.C. 2323.56(B), in addition to those required by R.C. 2315.34. To the extent that the plaintiff asserts a medical or allied claim as defined in R.C. 2305.11(D), R.C. 2323.57 applies rather than R.C. 2323.56. To the extent that the plaintiff asserts a tort action against a political subdivision under R.C. Chapter 2744 or a tort action against the state in the Court of Claims, R.C. 2323.56 does not apply. R.C. 2323.56(H).

R.C. 2315.34 requires jurors to "return a general verdict accompanied by answers to interrogatories," to determine the respective amounts of non-economic and economic damages, and to allocate liability among the plaintiff and defendants by percentages. R.C. 2315.35 then requires the court to "diminish the total amount of the compensatory damages that would have been recoverable by an amount that is proportionately equal to the percentage of negligence or other tortious conduct determined pursuant to section 2307.23 of the Revised Code that is attributable to the plaintiff." The Committee believes that the intent is that the court, rather than the jury, will allocate the plaintiff's recovery against a particular defendant according to whether the damages are non-economic or economic, and whether that defendant's allocable percentage of causation exceeds 50%, pursuant to R.C. 2307.22.

For negligence cases involving future damages, but no comparative negligence, see OJI-CV 315.09.

1. GENERAL. OJI-CV 403.01 § 1 (claims arising on and after 4/9/03).
2. INTRODUCTION TO INTERROGATORIES. OJI-CV 403.01 § 2 (claims arising on and after 4/9/03).
3. INTERROGATORIES.

COMMENT

The following interrogatories address only negligence claims as defined in R.C. 2315.34 which are also tort actions as defined in R.C. 2323.56(A)(6) and which are not excepted by R.C. 2323.56(H). Interrogatories (A) through (G) are identical to those set forth at OJI–CV 403.01 § 3 (claims arising on and after 4/9/03) and the COMMENTS therein are applicable. Use those seven Interrogatories and then Interrogatories (H), (I), (J), (K), (L), and (M) as follows.

(A) OJI-CV 403.01 § 3 (A) (claims arising on and after 4/9/03).

(B) OJI-CV 403.01 § 3 (B) (claims arising on and after 4/9/03).

(C) OJI-CV 403.01 § 3 (C) (claims arising on and after 4/9/03).

(D) OJI-CV 403.01 § 3 (D) (claims arising on and after 4/9/03).

(E) OJI-CV 403.01 § 3 (E) (claims arising on and after 4/9/03).

(F) OJI-CV 403.01 § 3 (F) (claims arising on and after 4/9/03).

(G) STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES, PAST AND FUTURE, SUFFERED BY THE PLAINTIFF WITHOUT REGARD TO THE PLAINTIFF'S (NEGLIGENCE) (*describe other tortious conduct*)

STATE YOUR ANSWER IN INK $ _____

_____ _____

_____ _____

_____ _____

_____ _____

Move to Interrogatory (H).

If (six) (three-fourths) jurors can not agree on an answer to interrogatory (G) report this to the court.

COMMENT

The Committee believes that since all the issues relating to damages and the separation into past and future damages are analytically different from those relating to causal negligence, the determination of all those issues may be made by all jurors without regard to their individual votes on causal negligence.

(H) WHAT PORTION OF YOUR ANSWER TO INTERROGATORY (G) IS PAST DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF?

STATE YOUR ANSWER IN INK $ _____

_____ _____

_____ _____

_____ _____

_____ _____

If you find that there are past damages, move to Interrogatory (I).

If you find that there are no past damages, move to Interrogatory (J).

(I) WHAT ARE THE PORTIONS OF THE PAST DAMAGES SHOWN IN YOUR ANSWER TO INTERROGATORY (H) THAT FALL INTO THE FOLLOWING:

(1) PAST ECONOMIC LOSS ..... $_____

(2) PAST NONECONOMIC LOSS ..... $_____

The total of these two amounts must equal your answer to Interrogatory (H).

_____ _____

_____ _____

Move to interrogatory (J).

(J) WHAT PORTION OF YOUR ANSWER TO INTERROGATORY (G) IS FUTURE DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF?

STATE YOUR ANSWER IN INK $ _____

_____ _____

_____ _____

_____ _____

_____ _____

If you find that there are future damages, move to Interrogatory (K).

If you find that there are no future damages, do not answer the remaining Interrogatories, complete the verdict form for plaintiff and report to the court that you have completed your deliberations.

(K) WHAT ARE THE PORTIONS OF THE FUTURE DAMAGES SHOWN IN YOUR ANSWER TO INTERROGATORY (J) THAT FALL INTO THE FOLLOWING:

(1) FUTURE ECONOMIC LOSS ..... $_____

(2) FUTURE NONECONOMIC LOSS ..... $_____

The total of these two amounts must equal your answer to Interrogatory (J).

_____ _____
_____ _____
_____ _____
_____ _____

If you find that there is future economic loss move to Interrogatory (L).

If you find that there is no future economic loss do not answer Interrogatory (L) complete the verdict form for plaintiff and report to the court that you have completed your deliberations.

(L) WHAT ARE THE PORTIONS, IF ANY, OF FUTURE ECONOMIC LOSS SHOWN IN YOUR ANSWER TO INTERROGATORY (K)(1) THAT FALL INTO THE FOLLOWING:

(1) WAGES, SALARIES OR OTHER LOST COMPENSATION (EARNING CAPACITY) (FRINGE BENEFITS) ..... $_____

(2) (EXPENDITURES) (EXPENSES) (COSTS) FOR MEDICAL CARE OR TREATMENT, REHABILITATION SERVICES, OR OTHER CARE, TREATMENT, SERVICES, PRODUCTS, OR
ACCOMMODATIONS ..... $_____

(3) ANY OTHER (EXPENDITURES) (EXPENSES)
(COSTS) ..... $_____

The total of future economic loss must equal your answer to Interrogatory (K)(1).

TOTAL ..... $_____

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

Drawn from R.C. 2323.56(B)(1).

4. PAST AND FUTURE DAMAGES. Damages that (result from) (are caused by) injury to the person are divided into past and future damages. "Past damages" are those that have accrued up to the time you reach your verdict. "Future damages" are those that are reasonably certain to occur after you reach your verdict.

COMMENT

Drawn from R.C. 2323.56(A)(2).

5. ECONOMIC LOSS. R.C. 2307.011(C).
6. NONECONOMIC LOSS. R.C. 2307.011(F).
7. FUTURE DAMAGES: COST OF ANNUITY (OPTIONAL). OJI-CV 315.13.
8. GENERAL VERDICT. OJI-CV 403.01 § 7 (claims arising on and after 4/9/03).

CV 403.07 Comparative negligence: more than one defendant, interrogatories on future damages required (claims arising on and after 1/5/88 but before 4/9/03) ***[Rev. 5-14-05]***

COMMENT

See COMMENTS to OJI-CV 403.03 (claims arising on and after 1/5/88 but before 4/9/03) and OJI-CV 403.05 (claims arising on and after 1/5/88 but before 4/9/03).

1. GENERAL. OJI-CV 403.03 § 1 (claims arising before 1/5/99).
2. INTRODUCTION TO INTERROGATORIES. OJI-CV 403.03 § 2 (claims arising before 1/5/88).
3. INTERROGATORIES. OJI-CV 403.03 § 3 (claims arising before 1/5/88).

COMMENT

Interrogatories (A) through (H) and the directions to the jury applicable to those interrogatories are identical to those set forth in OJI-CV 403.03 § 3 (claims arising before 1/5/88) and the COMMENTS therein are applicable. Use those eight Interrogatories and then Interrogatory (I) as follows.

(A) OJI-CV 403.03 § 3 (A) (claims arising before 1/5/88).

(B) OJI-CV 403.03 § 3 (B) (claims arising before 1/5/88).

(C) OJI-CV 403.03 § 3 (C) (claims arising before 1/5/88).

(D) OJI-CV 403.03 § 3 (D) (claims arising before 1/5/88).

(E) OJI-CV 403.03 § 3 (E) (claims arising before 1/5/88).

(F) OJI-CV 403.03 § 3 (F) (claims arising before 1/5/88).

(G) OJI-CV 403.03 § 3 (G) (claims arising before 1/5/88).

(H) OJI-CV 403.03 § 3 (H) (claims arising before 1/5/88).

If you have attributed (some negligence) (some implied assumption of the risk) (or both) to the plaintiff but in a percentage of 50% or less and attributed a percentage of negligence greater than zero to (*insert name of defendant 1*) and a percentage of negligence greater than zero to (*insert name of defendant 2*), then answer the following Interrogatory (I).

COMMENT

The Committee believes that since all the issues relating to damages and the separation into past and future damages are analytically different from those relating to causal negligence, the determination of all those issues may be made by all jurors without regard to their individual votes on causal negligence.

(I) STATE THE PORTION, IF ANY, OF THE TOTAL COMPENSATORY DAMAGES IN YOUR ANSWER TO INTERROGATORY (H) THAT IS PAST DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF:

STATE YOUR ANSWER IN INK $ _____

_____ _____

_____ _____

_____ _____

If you find that there are past damages, move to Interrogatory (J).

If you find that there are no past damages, move to Interrogatory (K).

COMMENT

Note that R.C. 2315.19 does not change the doctrine of joint and several liability unless (1) the plaintiff was causally negligent or impliedly assumed the risk, (2) the plaintiff is still entitled to recover some damages, and (3) *both* defendants were causally negligent. R.C.2315.19(D)(1).

(J) WHAT ARE THE PORTIONS OF THE PAST DAMAGES SHOWN IN YOUR ANSWER TO INTERROGATORY (I) THAT FALL INTO THE FOLLOWING:

(1) PAST ECONOMIC LOSS ..... $_____

(2) PAST NONECONOMIC LOSS ..... $_____

The total of these two amounts must equal your answer to Interrogatory (I).

_____ _____
_____ _____
_____ _____
_____ _____

Move to interrogatory (K).

(K) WHAT PORTION OF YOUR ANSWER TO INTERROGATORY (H) IS FUTURE DAMAGES, IF ANY, SUFFERED BY THE PLAINTIFF?

STATE YOUR ANSWER IN INK $ _____

_____ _____
_____ _____
_____ _____
_____ _____

If you find that there are future damages, move to Interrogatory (L).

If you find that there are no future damages, do not answer the remaining Interrogatories, complete the verdict form for plaintiff and report to the court that you have completed your deliberations.

(L) WHAT ARE THE PORTIONS OF THE FUTURE DAMAGES SHOWN IN YOUR ANSWER TO INTERROGATORY (K) THAT FALL INTO THE FOLLOWING:

(1) FUTURE ECONOMIC LOSS ..... $_____

(2) FUTURE NONECONOMIC LOSS ..... $_____

The total of these two amounts must equal your answer to Interrogatory (K).

_____ _____
_____ _____
_____ _____
_____ _____

If you find that there is future economic loss move to Interrogatory (M).

If you find that there is no future economic loss do not answer Interrogatory (M) complete the verdict form for plaintiff and report to the court that you have completed your deliberations.

(M) WHAT ARE THE PORTIONS, IF ANY, OF FUTURE ECONOMIC LOSS SHOWN IN YOUR ANSWER TO INTERROGATORY (L)(1) THAT FALL INTO THE FOLLOWING:

(1) WAGES, SALARIES OR OTHER LOST COMPENSATION (EARNING CAPACITY) (FRINGE BENEFITS) $_____

(2) (EXPENDITURES) (EXPENSES) (COSTS) FOR MEDICAL CARE OR TREATMENT, REHABILITATION SERVICES, OR OTHER CARE, TREATMENT, SERVICES, PRODUCTS, OR ACCOMMODATIONS $_____

(3) ANY OTHER (EXPENDITURES) (EXPENSES) (COSTS) $_____

The total of future economic loss must equal your answer to Interrogatory (L)(1).

TOTAL $_____

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

Drawn from R.C. 2323.56(B)(1).

4. PAST AND FUTURE DAMAGES. OJI-CV 403.05 § 4 (claims arising on and after 1/5/88 but before 4/9/03).
5. ECONOMIC AND NONECONOMIC LOSS. OJI-CV 403.05 § 5 (claims arising on and after 1/5/88 but before 4/9/03).
6. FUTURE DAMAGES: COST OF ANNUITY (OPTIONAL). OJI-CV 315.13.
7. INTERROGATORIES; WITH VICARIOUS LIABILITY. OJI-CV 403.03 § 4 (claims arising on and after 1/5/88 but before 4/9/03).
8. VICARIOUS LIABILITY. OJI-CV 537.07.
9. GENERAL VERDICT: NO VICARIOUS LIABILITY. OJI-CV 403.03 § 4 (claims arising before 1/5/88).
10. GENERAL VERDICT: WITH VICARIOUS LIABILITY. OJI-CV 403.03 § 8 (claims arising on and after 1/5/88 but before 4/9/03).

CV 403.07 Comparative fault: more than one defendant, interrogatories on future damages required (claims arising on and after 4/9/03) ***[Rev. 12-11-05]***

COMMENT

See comments to OJI-CV 403.03 (claims arising on and after 1/5/88 but before 4/9/03) and OJI-CV 403.05 (claims arising on and after 4/9/03).

1. GENERAL. OJI-CV 403.03 § 1 (claims arising on and after 4/9/03).

2. INTRODUCTION TO INTERROGATORIES. OJI-CV 403.03 § 2 (claims arising on and after 4/9/03).

3. INTERROGATORIES. OJI-CV 403.03 § 3 (claims arising on and after 4/9/03).

(A) OJI-CV 403.03 § 3 (A) (claims arising on and after 4/9/03).

(B) OJI-CV 403.03 § 3 (B) (claims arising on and after 4/9/03).

(C) OJI-CV 403.03 § 3 (C) (claims arising on and after 4/9/03).

(D) OJI-CV 403.03 § 3 (D) (claims arising on and after 4/9/03).

(E) OJI-CV 403.03 § 3 (E) (claims arising on and after 4/9/03).

(F) OJI-CV 403.03 § 3 (F) (claims arising on and after 4/9/03).

(G) OJI-CV 403.03 § 3 (G) (claims arising on and after 4/9/03).

(H) OJI-CV 403.03 § 3 (H) (claims arising on and after 4/9/03).

(I) OJI-CV 403.03 § 3 (I) (claims arising on and after 4/9/03).

(J) OJI-CV 403.03 § 3 (J) (claims arising on and after 4/9/03).

(K) OJI-CV 403.03 § 3 (K) (claims arising on and after 4/9/03).

(L) OJI-CV 403.05 § 3 (G) (claims arising on and after 4/9/03).

(M) OJI-CV 403.05 § 3 (H) (claims arising on and after 4/9/03).

(N) OJI-CV 403.05 § 3 (I) (claims arising on and after 4/9/03).

(O) OJI-CV 403.05 § 3 (J) (claims arising on and after 4/9/03).

(P) OJI-CV 403.05 § 3 (K) (claims arising on and after 4/9/03).

(Q) OJI-CV 403.05 § 3 (L) (claims arising on and after 4/9/03).

4. PAST AND FUTURE DAMAGES. OJI-CV 403.05 § 4 (claims arising on and after 4/9/03).

5. ECONOMIC LOSS. R.C. 2307.011(C).

6. NONECONOMIC LOSS. R.C. 2307.011(F).

7. FUTURE DAMAGES: COST OF ANNUITY (OPTIONAL). OJI-CV 315.13.

8. GENERAL VERDICT. OJI-CV 403.03 § 3 (claims arising before 1/5/88).

CV 403.09 Assumption of the risk *[Rev. 10/14/17]*

COMMENT

The instructions at OJI-CV 403.09 cover the affirmative defenses of express, implied, and primary assumption of risk. Contributory fault includes express or implied assumption of the risk. Contributory fault is not a bar to damages. R.C.

2307.011(B), R.C. 2315.33.

1. EXPRESS ASSUMPTION OF THE RISK. The defendant claims that the plaintiff expressly assumed the risk of injury. The plaintiff expressly assumed the risk if he/she expressly agreed or contracted with the defendant not to sue for any future injuries that might be caused by the defendant's negligence.

COMMENT

The definition of express assumption of the risk is taken from *Anderson v. Ceccardi,* 6 Ohio St.3d 110 (1983). For the effect of express assumption of the risk on a product liability claim as defined in R.C. 2307.71(M), see R.C. 2315.20.

Agreements whereby a plaintiff assumes the risk of personal injury are scrutinized by the courts to ensure that (1) they are entered into knowingly and voluntarily, *Nickell v. Atomic Speedway* 4th Dist. Ross No. 991 (July 5, 1983), Restatement of the Law 2d, Torts Section 496B, Comment c (1965); (2) the alleged tortious conduct of the defendant falls within the terms of the agreement, *Cain v. Cleveland Parachute Training Center*, 9 Ohio App.3d 27 (1983), Restatement of the Law 2d, Torts Section 496B, Comment d (1965); and (3) the agreement is not void as against public policy, *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1 (1869), Restatement of the Law 2d, Torts Section 567, and Section 496B, Comments e through j (1965).

2. IMPLIED ASSUMPTION OF THE RISK. The defendant claims that the plaintiff impliedly assumed the risk of injury. The plaintiff impliedly assumed the risk of injury if he/she had knowledge of a condition that was obviously dangerous to him/her and voluntarily exposed himself/herself to that risk of injury.

COMMENT

The definition of implied assumption of the risk is drawn from *Anderson v. Ceccardi*, 6 Ohio St.3d 110 (1983), and *Briere v. Lathrop Co.*, 22 Ohio St.2d 166 (1970). *See also Cremeans v. Willmar Henderson Mfg. Co.*, 57 Ohio St.3d 145 (1991) (an employee does not voluntarily assume the risk of injury in the course of his employment when that risk must be encountered in the normal performance of his/her required job duties and responsibilities).

3. PRIMARY ASSUMPTION OF THE RISK (SPORTS INJURIES).

COMMENT

Primary assumption of the risk bars recovery by plaintiff for injuries sustained during a sporting event when the plaintiff is a willing participant or spectator.

Primary assumption of the risk requires (1) that the danger involved is ordinary to the game, (2) that it is common knowledge that the danger exists, and (3) that the injury occurs as a proximate result of such danger during the game. Because the rule negates the plaintiff's claim under a "no duty" theory, its existence and application are questions of law for the court, not questions of fact for the jury. *Gallagher v. Cleveland Browns Football Co., Inc.*, 93 Ohio App.3d 449 (1994), discretionary appeal not allowed, 70 Ohio St.3d 1415; *Anderson v. Ceccardi, supra.*

See also Thompson v. McNeill, 53 Ohio St.3d 102, (1990) (willful and/or wanton conduct in reckless disregard of a plaintiff's safety is not protected by the primary assumption of risk rule); *Marchetti v. Kalish*, 53 Ohio St.3d 95 (1990) ("where individuals engage in recreational or sports activities, they assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant's actions were either 'reckless' or 'intentional' as defined in Sections 500 and 8A of the Restatement of Torts 2d").

(A) GENERAL. (Participants) (Spectators) in recreational or sports activities assume the ordinary risks of the activity. To recover for any injury, the plaintiff must prove that the defendant proximately caused (injury) (damage) to the plaintiff by intentional or reckless conduct. Conduct that is a foreseeable, customary part of the recreational or sports activity is not intentional or reckless.

COMMENT

Drawn from *Marchetti v. Kalish*, 53 Ohio St.3d 95 (1990) ("where individuals engage in recreational or sports activities, they assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant's actions were either 'reckless' or 'intentional' as defined in Sections 500 and 8A of the Restatement of Torts 2d"); *Thompson v. McNeill*, 53 Ohio St.3d 102, (1990) (willful and/or wanton conduct in reckless disregard of a plaintiff's safety is not protected by the primary assumption of risk rule); and *Gallagher v. Cleveland Browns Football Co., Inc.*, 93 Ohio App.3d 449 (1994), discretionary appeal not allowed, 70 Ohio St.3d 1415. The Committee believes that liability for "intentional" or "reckless" conduct is not subject to rules of comparative negligence.

(B) INTENTIONAL CONDUCT. Conduct is "intentional" when the actor desires to cause the consequences of the (act) (failure to act) or believes that the consequences are substantially certain to result from the (act) (failure to act).

COMMENT

Drawn from 1 Restatement of the Law 2d, Torts (1965) 15, Section 8A.

(C) RECKLESS CONDUCT. Conduct is in "reckless" disregard of the safety of another if the actor does an act, or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable person to realize, not only that the conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than a risk created by carelessness.

COMMENT

Drawn from 2 Restatement of the Law 2d, Torts (1965) 587, Section 500.

4. BURDEN OF PROOF. OJI-CV 303.03 §§ 1 and 4.

5. CONCLUSION (EXPRESS OR IMPLIED). If you find by the greater weight of the evidence that the plaintiff (expressly) (impliedly) assumed the risk of injury, you shall continue your deliberations to consider written questions called interrogatories.

COMMENT

See applicable sections of OJI-CV Chapter 403 for form and use of interrogatories.

6. CONCLUSION (INTENTIONAL/RECKLESS). If you find by the greater weight of the evidence that the defendant proximately caused (injury) (damage) to the plaintiff by intentional or reckless conduct, you shall return a verdict in favor of the plaintiff.

CV 403.11 Rescue or attempted rescue of another

COMMENT

The Committee believes that comparative negligence principles should be applied in rescue cases. The rescue doctrine was judicially created to avoid the absolute bar of contributory negligence. See Pennsylvania Co. v. Langendorf (1891), 48 Ohio St. 316 and Pittsburgh, Cincinnati, Chicago, and St. Louis Ry. Co. v. Lynch (1903), 69 Ohio St. 123. That bar was removed by enactment of Ohio's "comparative negligence" statute, R.C. 2315.19, effective June 20, 1980. Although the Ohio Supreme Court has not addressed the issue, other jurisdictions have consistently held that the adoption of a comparative negligence system abrogates the need for a special fault standard for rescuers. See Pachesky v. Getz (1988), 353 Pa. Super. 505; Sweetman v. State Highway Department

(Text continued on page 197)

(1984), 137 Mich. App. 14; Zimney v. Cooper-Jarrett, Inc. (1986), 8 Conn. App. 407, Certif. den. 201 Conn. 811.

See applicable sections of OJI-CV Chapter 403 for form and use of instructions in comparative negligence cases.

1. GENERAL. If you find that the (negligence, if any) (intentional conduct, if any) of the defendant proximately caused (*name of third party*) (the defendant) to be placed in a position of (danger) (immediate peril) and that the plaintiff was injured as a proximate result of the (rescue) (attempted rescue) of (*name of third party*) (the defendant), then the defendant may be liable for (injury) (damage) proximately caused to the plaintiff by the (rescue) (attempted rescue).

COMMENT

When a defendant intentionally endangers another or himself/herself and a rescue or attempted rescue proximately results in injury to the rescuer, the Committee believes that the following rules apply:

(a) The rescuer's negligence, if any, does not bar or diminish his/her recovery. See Labadie v. Semler (1990), 66 Ohio App.3d 540; and

(b) Punitive damages may be recovered. See OJI-CV 315.37; and

(c) Professional rescuers (police and fire, etc.) may recover only if the defendant's misconduct was willful or wanton. See OJI-CV 401.41; Gottas v. Consolidated Rail Corporation (1993), 89 Ohio App.3d 153.

2. NEGLIGENCE NOT IMPUTED. The plaintiff cannot be charged with the negligence, if any, of the person(s) (rescued) (endangered).

3. CIRCUMSTANCES. You are to measure the plaintiff's conduct on the basis of what a reasonably (cautious) (careful) (prudent) person would do or not do under the same or similar circumstances.

4. INTENTIONAL CONDUCT. Conduct is "intentional" when the actor desires to cause the consequences of the (act) (failure to act) or believes that the consequences are substantially certain to result from the (act) (failure to act).

COMMENT

Drawn from 1 Restatement of the Law 2d, Torts (1965), 15, Section 8A. See the Comment at OJI-CV 403.09, § 3.

5. WILLFUL OR WANTON MISCONDUCT. OJI-CV 401.41.

6. PROXIMATE CAUSE. 1 OJI-CV Chapter 405.

7. BURDEN AND CONCLUSION. If you find by the greater weight of the evidence that the plaintiff's (rescue) (attempted rescue) of (*name of third party*) (the defendant) was negligently made, or that the plaintiff assumed the risk of injury, you shall continue your deliberations to consider written questions called interrogatories.

COMMENT

See applicable sections of OJI-CV Chapter 403 for form and use of interrogatories in comparative negligence situations.

8. PUNITIVE DAMAGES. OJI-CV 315.37.

CV 403.13 Last clear chance

COMMENT

The doctrine of last clear chance has merged into negligence with the enactment of comparative negligence. Mitchell v. Ross (1984), 14 Ohio App.3d 75, 470 N.E.2d 245. What was historically, last clear chance, is now to be treated as an element of negligence to be used in determining the degree of percentage of negligence.

Chapter CV 405

PROXIMATE CAUSE

CV 405.01 **Proximate cause** *[Rev. 2/11/17]*

CV 405.03 **Remote cause, condition, or factor** *[Rev. 2/11/17]*

CV 405.05 **Intervening and superseding cause** *[Rev. 2/11/17]*

CV 405.01 Proximate cause *[Rev. 2/11/17]*

1. GENERAL. A party who seeks to recover for (injury) (death) (damages) must prove not only that the other party was negligent, but also that such negligence was a (proximate) (direct) cause of the (injury) (death) (damages).

2. PROXIMATE CAUSE DEFINED. "(Proximate) (Direct) cause" is an act or failure to act that in the natural and continuous sequence directly produced the (injury) (death) (damages) and without which the (injury) (death) (damages) would not have occurred.

3. MULTIPLE PERSONS OR CAUSES/SUBSTANTIAL FACTOR (ADDITIONAL).

COMMENT

The trial judge must select the appropriate alternative. Subsection (A) of this instruction should be used when multiple persons could be responsible for the plaintiff's damages. Subsection (B) of this instruction should be used when other causes, not necessarily a specific person, could be responsible for the plaintiff's damages.

(A) MULTIPLE PERSONS INVOLVED. There may be more than one (proximate) (direct) cause of the (injury) (death) (damage). When the negligent act or failure to act of one person (combines with) (joins) the negligence of another person to produce the (injury) (death) (damage), the negligence of each is a (proximate) (direct) cause. It is not necessary that the negligence of each person occur at the same (time) (place) or that there be a common purpose or action.

(*or*)

(B) MULTIPLE CONTRIBUTING CAUSES. There may be more than one (proximate) (direct) cause of the (injury) (death) (damage). The fact that some other cause combined with the negligence of a defendant in producing the (injury) (death) (damage) does not relieve a defendant from liability so long as the plaintiff proves that the conduct of the defendant was a substantial factor in producing the harm.

COMMENT

The substantial factor test is used to determine liability when factors other than the negligence of the tortfeasor may have caused the plaintiff's damages. *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 73 Ohio St.3d 609 (1995), citing *Pang v. Minch*, 53 Ohio St.3d 186 (1990).

4. REMOTE CAUSE OR CONDITION. OJI-CV 405.03.

5. INTERVENING AND SUPERSEDING CAUSES. OJI-CV 405.05.

CV 405.03 Remote cause, condition, or factor ***[Rev. 2/11/17]***

1. GENERAL. A person is not responsible for another's (injury) (death) (damages) if his/her negligence is a remote (cause) (condition) (factor) and not a (proximate) (direct) cause.

2. REMOTE DEFINED. A (cause) (condition) (factor) is remote when the result could not have been reasonably foreseen or anticipated as being the likely cause of any (injury) (death) (damages).

COMMENT

Armour & Co. v. Ott, 117 Ohio St. 252 (1927).

3. FORESEEABILITY. OJI-CV 401.07.

CV 405.05 Intervening and superseding cause ***[Rev. 2/11/17]***

1. CONCURRENT BUT INDEPENDENT NEGLIGENCE. OJI-CV 401.39.

2. CONCURRENT INDIVISIBLE CAUSES. When two or more independent negligent acts combine to produce a single harmful result, and when each act is a substantial factor in producing that result, the actors are jointly responsible for the result.

3. SUBSEQUENT BUT INDEPENDENT CAUSE. The (negligent) (intentional) act of any other person is not a defense to the negligence of the defendant unless you find that the other person's (negligent) (intentional) act was an independent and superseding cause.

4. INDEPENDENT SUPERSEDING CAUSE. Causal connection is broken when another's (negligent) (intentional) act, which could not have been reasonably foreseen and is fully independent of the defendant's negligence, intervenes and completely removes the effect of the defendant's negligence and becomes itself the (proximate) (direct) cause of the (injury) (death) (damages).

COMMENT

Leibreich v. A. J. Refrigerator, Inc., 67 Ohio St.3d 266 (1993); R. H. Macy &

Co. v. Otis Elevator Co., 51 Ohio St.3d 108 (1990); Cascone v. Herb Kay Co., 6 Ohio St.3d 155 (1983).

5. TEST FOR FORESEEABILITY. OJI-CV 401.07 § 2.

Chapter CV 406

NEGLIGENCE CONCLUSIONS

CV 406.01 Conclusions – negligence, one plaintiff, one defendant *[Rev. 1-24-09]*

CV 406.03 Conclusions – two or more defendants, no plaintiff negligence *[Rev. 1-24-09]*

CV 406.05 Conclusions – two or more defendants with plaintiff negligence *[Rev. 1-24-09]*

CV 406.01 Conclusions – negligence, one plaintiff, one defendant *[Rev. 1-24-09]*

1. NO PLAINTIFF NEGLIGENCE. If you find that the defendant was negligent and that defendant's negligence proximately caused (injury) (damage) to the plaintiff, then your verdict must be for the plaintiff.

However, if you find that plaintiff failed to prove that the defendant was negligent, or if you find that plaintiff failed to prove that defendant's negligence proximately caused (injury) (damage) to the plaintiff (or if you are unable to determine how the accident happened), then your verdict must be for the defendant.

2. WITH PLAINTIFF NEGLIGENCE. If you find that the defendant was negligent and that defendant's negligence proximately caused (injury) (damage) to the plaintiff, then your verdict must be for the plaintiff. If you also find the plaintiff was negligent and plaintiff's negligence was a proximate cause of his own (injury) (damage) and said negligence was 50% or less, then you must return a general verdict for the plaintiff. Also, you must continue deliberations and answer the interrogatories about the total amount of damages and the percentages of negligence attributable to each party.

If you find that the plaintiff failed to prove that the defendant was negligent, or if you find that plaintiff failed to prove that defendant's negligence proximately caused (injury) (damage) to the plaintiff or if plaintiff's negligence was more than 50% (or if you are unable to decide how the accident happened), then your verdict must be for the defendant.

CV 406.03 Conclusions – two or more defendants, no plaintiff negligence *[Rev. 1-24-09]*

1. TWO OR MORE DEFENDANTS. Since there are two or more defendants in this case, several alternatives are presented for your decision.

2. ONE OR MORE DEFENDANTS – LIABLE. If you find that (one or both) (some or all) defendant(s) were negligent and that such negligence proximately caused (injury) (damage) to the plaintiff, then your verdict must be for the plaintiff against (that) (those) defendant(s), according to your findings about whose negligence

proximately caused the (injury) (damage). You will answer the interrogatories about the proportionate share of common liability among the negligent defendant(s) according to their relative degree of fault.

3. OTHER DEFENDANTS NOT LIABLE. Even though you find the plaintiff proved that (one) (more) (some) defendant(s) (was) (were) negligent, if you find that plaintiff failed to prove either that other defendants were negligent or that their negligence proximately caused (injury) (damage) to the plaintiff, then your verdict must also be in favor of such other defendant(s).

4. NO DEFENDANT LIABLE. If you find that plaintiff failed to prove that any defendant was negligent, or if you find that plaintiff failed to prove that, that (its) (their) negligence proximately caused (injury) (damage) to the plaintiff (or if you are unable to determine how the accident happened), then your verdict must be for (both) (all) defendants.

CV 406.05 Conclusions – two or more defendants with plaintiff negligence ***[Rev. 1-24-09]***

1. TWO OR MORE DEFENDANTS. Since there are two or more defendants in this cause, several alternatives are presented for your decision.

2. ONE OR MORE DEFENDANTS LIABLE, PLAINTIFF NEGLIGENT. If you find that the plaintiff and (one or both) (some or all) defendant(s) (was) (were) negligent, and that such negligence proximately caused (injury) (damage) to the plaintiff, then your verdict must be for the plaintiff against (one or both) (some or all) defendants according to your findings about whose negligence proximately caused the (injury) (damage), unless plaintiff's negligence was greater than the combined negligence of all other persons from whom recovery is sought. The court (will instruct) (has instructed) you on answering the interrogatories.

3. CAUSATION. Even though you find in favor of the plaintiff as to one (or more) defendant(s), if you find that plaintiff failed to prove that negligence of other defendant(s) proximately caused (injury) (damage) to the plaintiff, then your verdict must be in favor of such other defendant(s).

4. NO DEFENDANT LIABLE. If you find that plaintiff failed to prove that any defendant was negligent, or if you find that plaintiff failed to prove that, that (its) (their) negligence proximately caused (injury) (damage) to the plaintiff or if plaintiff's negligence was more than 50% (or if you are unable to determine how the accident happened), then your verdict must be for (both) (all) defendants.

COMMENT

When the conditions applicable to several defendants are not the same, as where the negligence of one is directed, it is necessary to repeat the conclusions separately for each defendant, using OJI-CV 406.01 as a guide, in lieu of this combined instruction.

(Text continued on page 201)

Chapter CV 407

CHILDREN

CV 407.01 Care for safety of child

CV 407.03 Child under seven

CV 407.05 Measure of care by child

CV 407.07 Violation of statute by child

CV 407.09 Minor operating a motor vehicle

CV 407.11 Negligence of parent not imputed

CV 407.13 Conclusion on negligence *[Rev. 1-24-09]*

CV 407.15 Action by parent

CV 407.17 Action by administrator

CV 407.19 Liability of parents for tort of child

CV 407.21 Emancipation

CV 407.23 Damages, injury

CV 407.25 Failure to report known or suspected child abuse or neglect - person acting in official or professional capacity R.C. 2151.421(A)(1) (claims arising on and after 10/6/09) *[Rev. 8-19-09]*

CV 407.27 Failure to report known or believed child abuse or neglect - cleric or church leader R.C. 2151.421(A)(4) (claims arising on and after 10/6/09) *[Rev. 8-19-09]*

CV 407.01 Care for safety of child

1. ORDINARY CARE. OJI-CV 401.01.

2. DEGREE OF CARE. Children do not exercise the same degree of care for their own safety as do adults. In the exercise of ordinary care the defendant should anticipate the ordinary behavior of children (of the same or similar age) as would be anticipated by a person of ordinary (prudence) (care) under the same circumstances. The defendant must exercise a degree of care consistent with such circumstances. 70 Ohio Jurisprudence 3d (1986), Negligence, Sections 24, 25.

3. APPLYING STANDARD. In applying this standard, you should determine whether the defendant saw, or should have seen, such child (children); decide the apparent age of the child (children); what actions the child (children) did or did not do; and what actions defendant did or did not do, and, using the rule of ordinary care, decide whether or not defendant (was negligent) (failed to use ordinary care).

4. COULD NOT SEE. If you find that defendant did not see, or in the exercise of ordinary care he/she could not have seen the child (children) in time to avoid the

injury, or if under all the facts and circumstances in the exercise of ordinary care he/she could not have avoided injury to the child (children) then the defendant was using ordinary care under all the facts and circumstances (and was not negligent in this respect). *Boomershine v. Rice* (1960), 114 Ohio App. 267, 181 N.E.2d 723, 19 O.O.2d 168.

CV 407.03 Child under seven

1. INCAPABLE OF NEGLIGENCE. A child under seven years of age is unable to exercise ordinary care for (his) (her) own safety and is incapable of contributory negligence. Contributory negligence of the child is not an issue and cannot be considered by you.

COMMENT

A child under seven years of age is, as a matter of law, incapable of contributory negligence. *Holbrock v. Hamilton Distrib., Inc.* (1967), 11 Ohio St.2d 185, 228 N.E.2d 628, 40 O.O.2d 168. The *Holbrock* case holds that it is error to submit the issue of capability of a child under seven. Such issue is not submitted if the child is under seven at the time of the event.

CV 407.05 Measure of care by child

1. The conduct of a child (minor) is not measured by the same rules that apply to adults. The measure of care required of a boy (girl) is that degree of care which a boy (girl) of ordinary care and prudence and of the same age, capacity, education and experience would exercise for his (her) own safety under the same or similar circumstances. First, decide what the boy (girl) did or did not do; what his (her) capacity, education and experience was; what the conditions and circumstances were; then, apply this rule and decide whether the plaintiff (boy) (girl) exercised the degree of ordinary care required of him (her). 70 Ohio Jurisprudence 3d (1986), Negligence, Sections 87–89.

2. VIOLATION OF STATUTE BY CHILD. OJI-CV 407.07.

3. MINOR OPERATING A MOTOR VEHICLE. OJI-CV 407.09.

4. CONCLUSION ON NEGLIGENCE. OJI-CV 407.13.

CV 407.07 Violation of statute by child

1. The rule regulating the measure (duty) of care by children applies even when a child may have violated a (specific) statute. Ohio law requires . . . (explain applicable statute).

2. VIOLATION NOT PER SE. Generally when a statute imposes a specific requirement, as this one does, a violation is negligence as a matter of law; however, whether such a violation, if any, by the plaintiff (child) constitutes negligence is an

issue of fact to be decided by you according to the measure of care applicable to (boys) (girls) as the court has just instructed you and not by the specific terms of the statute. 70 Ohio Jurisprudence 3d, Negligence, Section 91.

COMMENT

If the minor is operating a motor vehicle see OJI-CV 407.09.

Minors who have reached the age of eighteen are responsible for their acts.

CV 407.09 Minor operating a motor vehicle

COMMENT

The rule of care applicable to a minor who has a driver's license and is operating a motor vehicle is undergoing change. In the absence of a definitive decision the Committee makes no recommendation.

The first rule is that the standard of care is different for minors. This is true even if a specific requirement is violated. *Hemmelgarn v. Bailey* (App. 1950), 104 N.E.2d 50, 61 Ohio Law Abs. 179; *Barga v. Longfellow* (1959), 111 Ohio App. 357, 172 N.E.2d 624, 14 O.O.2d 385; OJI-CV 407.07, OJI-CV 407.09.

Recent decisions require the same standard of care for some minors as that of a reasonably prudent adult. *Carano v. Cardina* (1961), 115 Ohio App. 30, 184 N.E.2d 430, 20 O.O.2d 178; *Karr v. McNeil* (1952), 92 Ohio App. 458, 110 N.E.2d 714, 50 O.O. 41. The reasons advanced for this rule are the danger incident to a dual standard of care on the highway and the fact that the legislature has seen fit to authorize a driver's license for minors. Holding all licensed drivers to the same standard of care is not a harsh rule. At age eighteen minors are considered as adults for all criminal purposes. Granting civil rights at a lower age suggests acceptance of full civil responsibility as of an adult.

A turning point in the attitude of the court toward minors may exist in *Englehardt v. Philipps* (1939), 136 Ohio St. 73, 23 N.E.2d 829, 15 O.O. 581, in which a child of 12 was injured falling off a diving tower. The court held that it may be assumed that a person of whatever age is able to appreciate the obvious risks incident to any sport or activity in which he may be able to engage with intelligence and proficiency, and must act accordingly. (pp. 81, 82)

CV 407.11 Negligence of parent not imputed

1. Negligence, if any, of the parent(s) of the plaintiff cannot be imputed to the plaintiff and does not bar a recovery by the plaintiff if you find that he (she) is otherwise entitled to recover. 70 Ohio Jurisprudence 3d, Negligence, Section 109.

CV 407.13 Conclusion on negligence *[Rev. 1-24-09]*

1. NEGLIGENCE CONCLUSIONS. OJI-CV Chapter 406.

CV 407.15 Action by parent

1. NEGLIGENCE OF PARENT. In event you find that negligence of the defendant proximately caused the injuries to the child, then you must further decide whether the negligence, if any, of the plaintiff father (mother) proximately contributed to cause the injuries which the child received.

2. DUTY OF PARENTS. Parents are not required to guard their children against unknown dangers or dangers that ordinary diligence and prudence would not disclose. The degree of care required depends upon the circumstances in the case and upon the situation and condition of the parents. A parent is required to exercise that degree of care and control over a child which an ordinarily careful and reasonable parent would exercise over a child of the same age, education and experience under the same or similar circumstances.

3. CONTRIBUTORY NEGLIGENCE. A failure by this plaintiff to exercise such care is negligence and deprives him (her) of the right to recover if such failure proximately contributed to cause the injuries to the child; (however, negligence of the mother (father), if it exists, will not be imputed to the father (mother) and will not defeat his (her) recovery).

COMMENT

This instruction has no application to actions by parents as natural guardians on behalf of the child.

CV 407.17 Action by administrator

1. ONE PARENT NEGLIGENT. In event you find that negligence of the defendant proximately caused the injuries to the decedent, then you must further decide whether the negligence, if any, of the decedent's parents (father) (mother) proximately contributed to cause the death of the child.

2. DUTY OF CARE BY PARENTS. OJI-CV 407.15.

3. NOT IMPUTED TO OTHER PARENT. Since this action is brought by the administrator for the benefit of the deceased child's heirs, namely his parents, contributory negligence, if any, by both parents, which proximately contributed to cause the child's death, will defeat any recovery; however, negligence of the mother (father), if any, will not be imputed to the father (mother) and will not defeat his (her) right to participate in any recovery.

4. DAMAGES. In event you find that the negligence of the mother (father) proximately contributed to cause decedent's death, then in your decision of the amount

of damages for the plaintiff the mother (father) of the decedent is not entitled to participate in any recovery on account of the death of her (his) son, and her (his) respective interest must not be considered or included in any amount in event of a verdict for the plaintiff. 30 Ohio Jurisprudence 3d (1981), Death, Sections 99, 101 and 102.

COMMENT

A special finding should be submitted to discover who was negligent so that the court may properly distribute the award.

CV 407.19 Liability of parents for tort of child

1. DUTY OF PARENTS. Parents are not generally liable for the acts or wrongs of their children; however, parents are negligent and become legally responsible for the acts of their children, if in the exercise of ordinary care they know or should know of wrongful acts of their children in connection with a dangerous instrument, and they thereafter fail to use ordinary care (in instructing the child in the proper use of such instrument) (or) (by failing to remove it from the child's possession) (or) (by failing to control the child so as to avoid injury to others).

COMMENT

A parent is liable for willful destructive acts of their children, regardless of negligence, up to the statutory amount, R.C. 3109.09. 46 Ohio Jurisprudence 3d (1994), Family Law, Section 266.

2. ORDINARY CARE. OJI-CV 401.01.

3. NEGLIGENCE OF PARENT. Before the plaintiff may recover you must find that his (her) injury was not only proximately caused by the child but that plaintiff's injury was also a natural and probable consequence of the failure of the parent(s) to exercise ordinary care.

COMMENT

Knowingly permitting a minor under seventeen to use an air gun is negligence per se. R.C. 2923.21.

CV 407.21 Emancipation

1. EARNINGS. Generally a minor may not recover for loss of earnings during his

minority because parents are entitled to the earnings of a child.

However, parents may release their right to their minor children's services and earnings. When they do, this waiver of the parental right is called emancipation.

2. DEFINITION. Emancipation may be achieved by an oral or written agreement, or it may be inferred or implied from the circumstances. Emancipation results by implication where the parents consent by act and conduct to the minor receiving and keeping his own earnings. This may result even though the minor continues to reside with his parents.

COMMENT

A minor living with his parents is presumed to be unemancipated. The burden in such case as to emancipation is upon the one asserting it. *Bagyi v. Miller* (1965), 3 Ohio App.2d 371, 210 N.E.2d 887, 32 O.O.2d 518; 47 Ohio Jurisprudence 3d (1994), Family Law, Section 1069.

3. CONCLUSION. If you find by the greater weight of the evidence that the minor was emancipated he/she is entitled to receive (recover) his own earnings. But if you fail to find by the greater weight of the evidence that the minor was emancipated, no allowance for personal earnings may be considered or made in this case.

COMMENT

For the purpose of settling claims an emancipated minor may obtain a finding to that effect and approval of a settlement of all claims in the probate court. R.C. 2111.181.

CV 407.23 Damages, injury

1. If you find for the plaintiff you will allow him/her such future damages as in your judgment he/she is entitled to receive. The measure of his/her damage and recovery is compensation. In this case you can allow nothing for any expense for there is no claim made as to expense that is not the cause of action of the minor in this case and there is no evidence on the point of expense. The measure of his/her damages, if you find for him/her, is compensation. In arriving at the amount you may take into consideration the nature and extent of his/her injuries, the permanency or lack of permanency of his/her injuries; the pain and suffering to which he/she may have been put by reason of such injuries or may be put in the future; the condition of the plaintiff at the present time and the condition that he/she may be in in the future by reason of such injuries; the effect of such injuries upon his/her bodily health and his/her general health and upon his/her ability in the future to labor and earn a living.

But, with respect to considering plaintiff's ability to earn a living in the future, you

may not give any consideration to plaintiff's probable earnings prior to the time he/she comes of age, but you may consider the effect of such injuries upon his/her ability to labor and earn a living after he/she becomes of age.

COMMENT

Bluebird Baking Co. v. McCarthy (App. 1935), 36 N.E.2d 801, 3 O.O. 490. The last sentence above is supplied in an attempt to correct the error in the charge as given. However, the safer course to pursue is to avoid submitting the question of loss of earnings by a minor unless insisted upon by counsel for plaintiff.

2. If you do so find for the plaintiff under these instructions, in your determination of the question of damages in this case you will take into consideration, the nature, character and extent of the injuries sustained by the plaintiff, and whether or not, and to what extent, it is reasonably certain that such injuries are permanent; you will take into consideration whatever pain and suffering the plaintiff has endured in the past, and whether or not, and to what extent, it is reasonably certain that he/she will endure pain and suffering in the future. You will award him/her such damages as will fairly compensate the plaintiff for all damage and loss which the evidence shows that the plaintiff has sustained, directly, as a result of said injuries.

COMMENT

Porter v. Toledo Terminal Rd. Co. (1950), Lucas County Common Pleas Court, reversed on other grounds, 152 Ohio St. 463, 90 N.E.2d 142, 40 O.O. 485.

CROSS-REFERENCE: Damages on personal injury, see OJI-CV 315.01.

CV 407.25 Failure to report known or suspected child abuse or neglect - person acting in official or professional capacity R.C. 2151.421(A)(1) (claims arising on and after 10/6/09) *[Rev. 8-19-09]*

COMMENT

R.C. 2151.421(A)(1)(a) now imposes an objective reasonable person standard; former R.C. 2151.421 imposed a subjective standard. *Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 118 Ohio St.3d 400, 2008-Ohio-2618.

For claims arising before 10/6/09, the court must draft instructions based upon the prior statute.

1. GENERAL. The plaintiff claims that the defendant(s) failed to report (known)

(suspected) child (abuse) (neglect).

2. ELEMENTS OF CLAIM. The plaintiff must prove by the greater weight of the evidence that

(A) the defendant(s) (was) (were) a/an (*insert statutory category*);

COMMENT

R.C. 2151.421(A)(1)(a) applies only to those categories of persons listed in R.C. 2151.421(A)(1)(b).

(B) the defendant(s) (was) (were) acting in his/her/its/their (official) (professional) (capacity) (capacities);

(C) the defendant(s) (knew) (had reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect) that a (child under eighteen) ([mentally retarded] [developmentally disabled] [physically impaired] child under twenty-one) years of age (suffered) (faced a threat of suffering) any physical or mental (wound) (injury) (disability) (condition) of a nature that reasonably indicated (abuse) (neglect) of the child; and

(D) the defendant(s) failed to immediately report that (knowledge) (reasonable cause to suspect) to

(*Use appropriate alternative[s]*)

(1) a/an (*insert name of county in which the child resided*) County public children services agency, municipal peace officer, or county peace officer.

(*or*)

(2) a/an (*insert name of county which the alleged conduct occurred, if different than the county in which the child resided*) County public children services agency, municipal peace officer, or county peace officer.

(*or*)

(3) the state highway patrol.

COMMENT

Drawn from R.C 2151.421(A)(1)(a).

Subsection (D)(3) applies only when the child is under eighteen years of age and is in the custody of a state correctional institution. R.C. 5120.173.

3. REASONABLE CAUSE TO SUSPECT. In deciding whether the defendant(s) had

reasonable cause to suspect that a child has (suffered) (faced a threat of suffering) any (abuse) (neglect), you must put yourself in the position of the defendant(s) with his/her/its/their knowledge or lack of knowledge, and under the circumstances that surrounded him/her/it/them at that time. You must then consider the conduct of the persons involved and decide whether their acts and words and all the surrounding circumstances would have caused a person of ordinary prudence and care to suspect that a child has (suffered) (faced a threat of suffering) any (abuse) (neglect).

4. ABUSED CHILD. R.C. 2151.031.

5. NEGLECTED CHILD. R.C. 2151.03.

6. AFFIRMATIVE DEFENSE:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) ATTORNEY-CLIENT/PHYSICIAN-PATIENT PRIVILEGE. The defendant claims that he/she was not required to make a report. To establish this defense, the defendant must prove by the greater weight of the evidence that

(1) he/she was (an attorney) (a physician);

(2) he/she received the communication regarding the (known) (suspected) child (abuse) (neglect) from a (client) (patient) in (an attorney-client) (a physician-patient) relationship; and

(3) he/she could not testify with respect to that communication in a civil or criminal proceeding.

COMMENT

Drawn from R.C. 2151.421(A)(2). The Committee believes this instruction should be given only in the rare occasion where there is a factual dispute as to whether the communication is privileged. Cf. *State v. Pembaur* (Feb. 18, 1981), 1st Dist. No. C-790380.

(C) LACK OF ATTORNEY-CLIENT/PHYSICIAN-PATIENT PRIVILEGE (ADDITIONAL).

COMMENT

If the court decides that the communication is privileged, give the first parenthetical instruction. If the jury must decide whether the communication is privileged, give the second parenthetical instruction.

(The court has decided that the communication is privileged.) (If you find by the

greater weight of the evidence that the communication is privileged, you must next decide whether the defendant was required to make a report.) Regardless of this privilege, the defendant was required to make a report if you find the plaintiff has proved by the greater weight of the evidence all of the following:

(1) the (client) (patient), at the time of the communication, was a (child under eighteen) ([mentally retarded] [developmentally disabled] [physically impaired] person under twenty-one) years of age;

(2) the defendant (knew) (had reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe) as a result of (the communication) (any observations made during the communication) that the (client) (patient) had (suffered) (faced a threat of suffering) any physical or mental (wound) (injury) (disability) (condition) of a nature that reasonably indicates (abuse) (neglect); and

(3) the (abuse) (neglect) did not arise out of the (client's) (patient's) attempt to have an abortion without the notification of her (parents) (guardian) (custodian).

COMMENT

Drawn from R.C. 2151.421(A)(3)(a) – (c).

7. CONCLUSION. OJI-CV Chapter 313.

8. CONCLUSION WITH AFFIRMATIVE DEFENSE. If you find by the greater weight of the evidence that the defendant(s) failed to report (known) (suspected) child (abuse) (neglect) and that such failure was a proximate cause of any injuries suffered by the plaintiff, then you must continue your deliberations and consider the issue of damages. On the other hand, if the plaintiff failed to prove by the greater weight of the evidence that the defendant(s) failed to report (known) (suspected) child (abuse) (neglect), or the plaintiff failed to prove by the greater weight of the evidence that the defendant(s)'s failure to report was a proximate cause of any (injury) (damage) claimed by the plaintiff, or if you find that the defendant proved by the greater weight of the evidence the affirmative defense, you must find for the defendant(s) and you will not consider damages.

9. PROXIMATE CAUSE. OJI-CV 405.01.

10. COMPENSATORY DAMAGES. OJI-CV Chapter 315; R.C. 2151.421(M).

11. PUNITIVE DAMAGES. OJI-CV 315.37; R.C. 2151.421(M).

CV 407.27 Failure to report known or believed child abuse or neglect - cleric or church leader R.C. 2151.421(A)(4) (claims arising on and after 10/6/09) *[Rev. 8-19-09]*

COMMENT

R.C. 2151.421(A)(4)(a) now imposes an objective reasonable person standard; former R.C. 2151.421 imposed a subjective standard. *Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 118 Ohio St.3d 400, 2008-Ohio-2618.

For claims arising before 10/6/09, the court must draft instructions based upon the prior statute.

1. GENERAL. The plaintiff claims that the defendant failed to report (known) (believed) child (abuse) (neglect).

2. ELEMENTS OF CLAIM. The plaintiff must prove by the greater weight of the evidence that

(A) the defendant was a (cleric) (person, other than a volunteer, designated by a [church] [religious society] [faith], who, acting as a leader, official, or delegate on behalf of the [church] [religious society] [faith], was acting in [an official] [a professional] capacity);

(B) the defendant (knew) (had reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe) that a (child under eighteen) ([mentally retarded] [developmentally disabled] [physically impaired] child under twenty-one) years of age (suffered) (faced a threat of suffering) any physical or mental (wound) (injury) (disability) (condition) of a nature that reasonably indicated (abuse) (neglect) of the child;

(C) the defendant (knew) (had reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe) that another (cleric) (person, other than a volunteer, designated by a [church] [religious society] [faith] who was acting as a leader, official, or delegate on behalf of the [church] [religious society] [faith]) did (cause) (pose a threat of causing) any physical or mental (wound) (injury) (disability) (condition) of a nature that reasonably indicated (abuse) (neglect) of the child; and

(D) the defendant failed to immediately report that (knowledge) (reasonable cause to believe) to

(*Use appropriate alternative[s]*)

(1) a/an (*insert name of county in which the child resided*) County public children services agency, municipal peace officer, or county peace officer.

(*or*)

(2) a/an (*insert name of county which the alleged conduct occurred, if different than the county in which the child resided*) County public children services agency, municipal peace officer, or county peace officer.

(*or*)

(3) the state highway patrol.

COMMENT

Drawn from R.C. 2151.421(A)(4)(a).

Subsection (D)(2) applies only when the child is under eighteen years of age and is in the custody of a state correctional institution. R.C. 5120.173.

3. REASONABLE CAUSE TO BELIEVE. In deciding whether the defendant had reasonable cause to believe that a child has (suffered) (faced a threat of suffering) any (abuse) (neglect), you must put yourself in the position of the defendant with his/her knowledge or lack of knowledge, and under the circumstances that surrounded him/her at that time. You must then consider the conduct of the persons involved and decide whether their acts and words and all the surrounding circumstances would have caused a person of ordinary prudence and care to believe that a child has (suffered) (faced a threat of suffering) any (abuse) (neglect).

4. ABUSED CHILD. R.C. 2151.031.

5. NEGLECTED CHILD. R.C. 2151.03.

6. CLERIC. "Cleric" means a member of the clergy, rabbi, priest, Christian Science practitioner, or regularly ordained, accredited, or licensed minister of an established and legally cognizable church, denomination, or sect.

COMMENT

R.C. 2317.02(C)(2)(a).

7. AFFIRMATIVE DEFENSES:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) CLERIC-PENITENT PRIVILEGE WHEN COMMUNICATION NOT RECEIVED IN SACRED TRUST. The defendant claims that he/she was not required to make a report. To establish this defense, the defendant must prove by the greater weight of the evidence that

(1) he/she was a cleric;

(Text continued on page 208.5)

(2) he/she received the communication regarding the (known) (believed) child (abuse) (neglect) in a cleric-penitent relationship; and

(3) he/she could not testify with respect to that communication in a civil or criminal proceeding.

COMMENT

Drawn from R.C. 2151.421(A)(4)(b). The Committee believes this instruction should be given only in the rare occasion where there is a factual dispute as to whether the communication is privileged. Cf. *State v. Pembaur* (Feb. 18, 1981), 1st Dist. No. C-790380.

(C) LACK OF CLERIC-PENITENT PRIVILEGE (ADDITIONAL).

COMMENT

If the court decides that the communication is privileged, give the first parenthetical instruction. If the jury must decide whether the communication is privileged, give the second parenthetical instruction.

(The court has decided that the communication is privileged.) (If you find by the greater weight of the evidence that the communication is privileged, you must next decide whether the defendant was required to make a report.) Regardless of this privilege, the defendant was required to make a report if you find the plaintiff has proved by the greater weight of the evidence all of the following:

(1) the penitent, at the time of the communication, was a (child under eighteen) ([mentally retarded] [developmentally disabled] [physically impaired] person under twenty-one) years of age;

(2) the defendant (knew) (had reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe) as a result of (the communication) (any observations made during the communication) that the penitent had (suffered) (faced a threat of suffering) any physical or mental (wound) (injury) (disability) (condition) of a nature that reasonably indicates (abuse) (neglect); and

(3) the (abuse) (neglect) did not arise out of the penitent's attempt to have an abortion performed upon a (child under eighteen) ([mentally retarded] [developmentally disabled] [physically impaired] person under twenty-one) years of age without the notification of that person's (parents) (guardian) (custodian).

COMMENT

Drawn from R.C. 2151.421(A)(4)(c)(i)–(iii).

(D) CLERIC-PENITENT PRIVILEGE WHEN COMMUNICATION RECEIVED IN SACRED TRUST. The defendant claims that he/she was not required to make a report. To establish this defense, the defendant must prove by the greater weight of the evidence that

(1) he/she is a cleric;

(2) he/she received the communication regarding the (known) (believed) child (abuse) (neglect) in a cleric-penitent relationship; and

(3) he/she received the communication in the sacred trust.

COMMENT

Drawn from R.C. 2151.421(A)(4)(a) and (d).

The Committee believes this instruction should be given only in the rare occasion where there is a factual dispute as to whether the communication was received in the sacred trust. Cf. *State v. Pembaur* (Feb. 18, 1981), 1st Dist. No. C-790380.

8. SACRED TRUST. R.C. 2317.02(C)(2)(b)(i) and (ii).

9. CONCLUSION. OJI-CV Chapter 313.

10. CONCLUSION WITH AFFIRMATIVE DEFENSE. If you find by the greater weight of the evidence that the defendant failed to report (known) (believed) child (abuse) (neglect) and that such failure was a proximate cause of any injuries suffered by the plaintiff, then you must continue your deliberations and consider the issue of damages. On the other hand, if the plaintiff failed to prove by the greater weight of the evidence that the defendant failed to report (known) (believed) child (abuse) (neglect), or the plaintiff failed to prove by the greater weight of the evidence that the defendant's failure to report was a proximate cause of any (injury) (damage) claimed by the plaintiff, or if you find that the defendant proved by the greater weight of the evidence the affirmative defense, you must find for the defendant and you will not consider damages.

11. PROXIMATE CAUSE. OJI-CV 405.01.

12. COMPENSATORY DAMAGES. OJI-CV Chapter 315; R.C. 2151.421(M).

13. PUNITIVE DAMAGES. OJI-CV 315.37; R.C. 2151.421(M).

(Text continued on page 209)

Chapter CV 409

ANIMALS

CV 409.01 Liability of owner of dog

CV 409.03 Affirmative defenses

CV 409.05 Liability of owner of wild animal

CV 409.07 Liability of owner of domestic animal ***[Rev. 9/15/18]***

CV 409.01 Liability of owner of dog

COMMENT

R.C. 955.28 was amended effective July 10, 1987, and the following instructions comply with the 1987 provisions. If the cause of action arose before July 10, 1987, the old statute applies. Under both versions of the statute, the liability is strict or absolute, there being no need to prove defendant's negligence or other fault. *Garrard v. McComas* (1982), 5 Ohio App.3d 179, 450 N.E.2d 730.

1. PLAINTIFF'S CLAIM. This action is brought by the plaintiff to recover damages caused by a dog that the plaintiff claims was (owned) (kept) (harbored) by the defendant. The (owner) (keeper) (harborer) of a dog is liable in damages for any (injury) (death) (loss to person or property) caused by the dog, without regard to his negligence or other fault.

2. DEFENDANT'S CLAIM. The defendant claims that he is not liable to the plaintiff because the (injury) (death) (loss to person or property) was caused at a time when the plaintiff

(*Use appropriate alternative*)

(A) was committing or attempting to commit a trespass or other criminal offense on the defendant's property.

(*or*)

(B) was committing or attempting to commit a criminal offense against any person.

(*or*)

(C) was teasing, tormenting, or abusing the dog on the defendant's property.

3. ELEMENTS. You may find for the plaintiff if you find by the greater weight of the evidence:

(A) that the defendant was the (owner) (keeper) (harborer) of the dog;

(B) that the plaintiff suffered (injury) (death) (loss to person or property); and

(C) that the dog (directly) (proximately) caused the (injury) (death) (loss to person or property).

4. OWNER. The owner of a dog is the person to whom the dog belongs and who has the right to dispose of it.

COMMENT

Drawn from *Garrard v. McComas* (1982), 5 Ohio App.3d 179, 450 N.E.2d 730.

5. KEEPER OR HARBORER. The keeper or harborer of a dog is a person who has the possession, care and control of the dog, temporary or otherwise, even though he does not own it.

COMMENT

Drawn from Ballentine's Law Dictionary (1969) 549, 699, and Webster's Third New International Dictionary (1971), 1031, 1236. See *Garrard v. McComas, supra.*

6. PROXIMATE CAUSE. OJI-CV 405.01.

7. AFFIRMATIVE DEFENSES. OJI-CV 409.03.

8. CONCLUSION FOR PLAINTIFF. You may find for the plaintiff if you find by the greater weight of the evidence that the defendant was the (owner) (keeper) (harborer) of a dog that (directly) (proximately) caused (injury) (death) (loss to person or property) of the plaintiff. If you find for the plaintiff you then consider the issue of damages.

9. CONCLUSION FOR DEFENDANT. On the other hand, you may find for the defendant, if you find that the plaintiff failed to prove by the greater weight of the evidence that the defendant was the (owner) (keeper) (harborer) of a dog that (directly) (proximately) caused (injury) (death) (loss to the plaintiff's person or property), or if you find that the evidence is evenly balanced on any of those issues, or if you find that even though the dog caused the plaintiff's (injury) (death) (loss), the defendant proved by the greater weight of the evidence (*describe the affirmative defense as presented by the defendant*).

10. DAMAGES. OJI-CV Chapter 315.

CV 409.03 Affirmative defenses

1. AFFIRMATIVE DEFENSE. OJI-CV 303.03 § 4.

2. DEFENDANT'S PROOF. You may find for the defendant if you find by the greater weight of the evidence that at the time of the (injury) (death) (loss), the plaintiff

(*Use appropriate alternative*)

(A) was committing or attempting to commit (a trespass) (*describe other criminal offense*) on the defendant's property.

(*or*)

(B) was committing or attempting to commit (*describe criminal offense*) against any person.

(*or*)

(C) was teasing, tormenting, or abusing the dog on the defendant's property.

3. TRESPASSER. OJI-CV 617.09 § 2.

4. CRIMINAL OFFENSE.

COMMENT

The judge may be required to tailor an instruction describing the criminal offense that defendant claims plaintiff was committing or attempting to commit, if any factual issue is raised by the evidence.

5. TEASE, TORMENT, ABUSE. "Teasing" means to annoy or to trouble or worry persistently, to be troublesome or to pester. "Tormenting" is conduct which provokes a greater annoyance and implies some torture or pain. "Abusing" is mistreatment which includes some physical injury or pain to the animal.

COMMENT

These definitions were used by the trial court in *Ramsey v. King* (1984), 14 Ohio App.3d 138, 470 N.E.2d 241, in which the appellate court held that a three-year-old was incapable of teasing, tormenting or abusing an animal as a matter of law.

6. ON DEFENDANT'S PROPERTY. The defendant must prove that the (trespass) (*describe criminal offense*) (teasing) (tormenting) (abusing) was on property owned or occupied by the defendant.

COMMENT

Note that it is an affirmative defense if the plaintiff was committing or attempting to commit a criminal offense against any person, whether or not on the defendant's property.

CV 409.05 Liability of owner of wild animal

COMMENT

The doctrine of strict liability for injury or damage caused by a wild animal arises under common law. *Moloney v. Columbus* (1965), 2 Ohio St.2d 213, 31 O.O.2d 447, 208 N.E.2d 141; *Newman v. Cleveland Museum of Natural History* (1944), 143 Ohio St. 369, 28 O.O. 321, 55 N.E.2d 575; Annotation (1968), 21 A.L.R.3d 603.

The question of whether an animal is wild or domestic will customarily be one of law. The fact that an animal, wild by nature, has been tamed, does not make it a domestic animal for purposes of liability. *Newman v. Cleveland Museum of Natural History* (1944), 143 Ohio St. 369, 28 O.O. 321, 55 N.E.2d 575.

1. GENERAL. The (owner) (keeper) of a (*describe wild animal*) is liable for any injury or damage caused by it, without regard to the (owner's) (keeper's) negligence or other fault.

2. ELEMENTS. You may find for the plaintiff if you find by the greater weight of the evidence:

(A) that the defendant was the (owner) (keeper) of the (*describe animal*) and

(B) that the (*describe animal's act*) was the (direct) (proximate) cause of the (injury) (damage) claimed by the plaintiff.

3. OWNER. OJI-CV 409.01 § 4.

4. KEEPER. OJI-CV 409.01 § 5.

COMMENT

The common law doctrine of strict liability for wild animals covers owners and keepers, not harborers. Delete any reference to harborers in the instruction.

5. PROXIMATE CAUSE. OJI-CV 405.01.

6. CONCLUSION FOR PLAINTIFF. You may find for the plaintiff if you find by the greater weight of the evidence that the defendant was the (owner) (keeper) of the (*describe animal*), that it committed the act complained of, and that such act was the (direct) (proximate) cause of the (injury) (damage).

7. CONCLUSION FOR DEFENDANT. On the other hand, you may find for the defendant, if you find that the plaintiff had failed to prove by the greater weight of the evidence that the defendant was the (owner) (keeper) of the animal, or that the animal committed the act complained of, or that such act was the direct and proximate cause

of the (injury) (damage), or if you find that the evidence was evenly balanced on any of those issues.

8. DAMAGES. OJI-CV Chapter 315.

CV 409.07 Liability of owner of domestic animal *[Rev. 9/15/18]*

COMMENT

The common law is that if the damage occurs while animals are trespassing on land owned by the plaintiff (or where the plaintiff is a family member or employee of the owner), the defendant is strictly liable, but if the damage occurs on land in which the plaintiff does not have a "possessory interest" such as a highway, then the plaintiff must prove negligence. *Burnett v. Rice*, 39 Ohio St.3d 44 (1988); *Reed v. Molnar*, 67 Ohio St.2d 76 (1981). *See generally*, 6A American Law of Property (1954), Section 28.2; Annotation, 29 A.L.R.4th 431 (collisions with animals on highways); Annotation, 49 A.L.R.4th 710 (trespass).

Nixon v. Harris, 15 Ohio St.2d 105 (1968), and *Morgan v. Hudnell*, 52 Ohio St. 552 (1895), fit the strict liability category in that the animal was a trespasser. *Reed v. Molnar*, 67 Ohio St.2d 76 (1981) (distinguishes *Nixon* on this point); *Barber v. Krieg*, 172 Ohio St. 433 (1961), *Drew v. Gross*, 112 Ohio St. 485 (1925), *Marsh v. Koons*, 78 Ohio St. 68 (1908), *Dungan v. Hart*, 107 Ohio App. 431 (1958), *Sutfin v. Burton*, 91 Ohio App. 177 (1951), fit the negligence category in that the animal was on a highway.

1. GENERAL. This action is brought by the plaintiff to recover damages for injury to (person) (property) caused by (*describe domestic animal*). You must find for the plaintiff if you find by the greater weight of the evidence

(A) that the defendant was the (owner) (keeper) of the (*describe domestic animal*); and

(B) that the (*describe domestic animal*) committed (*describe act*); and

(*Use appropriate alternative*)

(C)(1) that the injury occurred on property owned or occupied by the (plaintiff) (plaintiff's family) (plaintiff's employer);

(*or*)

(C)(2) that the defendant was negligent, and that the defendant's negligence (directly) (proximately) caused the injury to the plaintiff's (person) (property).

2. OWNER. OJI-CV 409.01.

3. KEEPER. OJI-CV 409.01.

COMMENT

The common law doctrine of liability for negligence in handling domestic

animals covers owners and keepers, not harborers. Delete any reference to harborers in the instructions.

4. NEGLIGENCE. OJI-CV 401.01.

COMMENT

This instruction applies only to injuries occurring on land in which the plaintiff does not have a possessory interest.

R.C. 951.02 creates a rebuttal presumption that the presence of an animal on a public road was caused by the owner's negligence, which can be outweighed by evidence of the owner's reasonable precautions. *Burnett v. Rice*, 39 Ohio St.3d 44 (1988). *See* OJI-CV 309.01.

5. PROPENSITIES OF LIVESTOCK. The owner of domestic animals is responsible for damage caused by his/her/its negligence in keeping them. The principal test of the owner's negligence is whether he/she/it could or could not reasonably have anticipated the occurrence that resulted in the injury. The owner is chargeable with knowledge of the propensities of his/her/its livestock; that is, with knowledge of what the animals are likely to do. Thus a person who (allows his animals to be at large) (*describe other negligence*) is liable for those damages that he/she/it could reasonably have foreseen they would cause.

COMMENT

Drawn from *Drew v. Gross*, 112 Ohio St. 485 (1925). This instruction applies only to injuries occurring on land in which the plaintiff does not have a possessory interest.

6. PROXIMATE CAUSE. OJI-CV 405.01.

7. NEGLIGENCE CONCLUSIONS. OJI-CV Chapter 406.

8. DAMAGES. OJI-CV Chapter 315.

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Chapter CV 411

AUTOMOBILES *[Rev. 12/6/13]*

CV 411.01 Negligence distinguished from negligence as a matter of law *[Rev.12/6/14]*

CV 411.03 Failure to comply with the order or signal of police officer *[Rev. 12/6/14]*

CV 411.05 Emergency vehicles going past red or stop signal R.C. 4511.03 *[Rev. 12/6/14]*

CV 411.07 Rules on private property R.C. 4511.08 *[Rev. 12/6/14]*

CV 411.09 Traffic control devices; signals R.C. 4511.12 *[Rev. 12/6/14]*

CV 411.11 Changing signal lights R.C. 4511.13 *[Rev. 12/6/14]*

CV 411.13 Operation in willful or wanton disregard of the safety of persons or property R.C. 4511.20 *[Rev. 12/6/14]*

CV 411.15 Reasonable control of vehicle R.C. 4511.202 *[Rev. 12/6/14]*

CV 411.17 Speed R.C. 4511.21 *[Rev. 12/6/14]*

CV 411.19 Assured clear distance R.C. 4511.21 *[Rev. 12/6/14]*

CV 411.21 Failure to drive on right side of roadway R.C. 4511.25 *[Rev. 12/6/14]*

CV 411.23 Street racing R.C. 4511.251 *[Rev. 12/6/14]*

CV 411.25 Vehicles traveling in opposite directions R.C. 4511.26 *[Rev. 12/6/14]*

CV 411.27 Overtaking and passing R.C. 4511.27 *[Rev. 12/6/14]*

CV 411.29 Failure to give right of way by overtaken vehicle R.C. 4511.27 *[Rev. 12/6/14]*

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CV 411.33 Hazardous zones R.C. 4511.31 *[Rev. 12/6/14]*

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CV 411.37 Driving in marked lanes R.C. 4511.33 *[Rev. 12/6/14]*

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CV 411.41 Divided highways R.C. 4511.35 *[Rev. 12/6/14]*

CV 411.43 Turns at intersections R.C. 4511.36 *[Rev. 12/6/14]*

CV 411.45 U turn prohibited; turning in roadway R.C. 4511.37 *[Rev. 12/6/14]*

CV 411.47 Starting and backing R.C. 4511.38 *[Rev. 12/6/14]*

CV 411.49 Signals for turning R.C. 4511.39 *[Rev. 12/6/14]*

CV 411.51 Right of way; general *[Rev. 12/6/14]*

CV 411.53 Stopping at sidewalks in business or residence district R.C. 4511.431 *[Rev. 12/6/14]*

CV 411.55 Pedestrians on sidewalk R.C. 4511.441 *[Rev. 12/6/14]*

CV 411.57 Public safety vehicles—duty of others R.C. 4511.452 *[Rev. 12/6/14]*

CV 411.59 Right of way when entering highway from other than roadway R.C. 4511.44 *[Rev. 12/6/14]*

CV 411.61 Right of way of pedestrian R.C. 4511.46 *[Rev. 12/6/14]*

CV 411.63 Blind persons R.C. 4511.47 *[Rev. 12/7/14]*

CV 411.65 Traveling on outside of vehicle R.C. 4511.51 *[Rev. 12/6/14]*

CV 411.67 Parking on highways R.C. 4511.66 *[Rev. 12/6/14]*

CV 411.69 Unsafe vehicle R.C. 4513.02 *[Rev. 12/6/14]*

CV 411.71 Failure to display lights or illuminating devices R.C. 4513.03 *[Rev. 12/6/14]*

CV 411.73 Automobile affirmative defenses *[Rev. 12/6/14]*

CV 411.75 Liability of owner of vehicle (negligent entrustment) *[Rev. 4/28/18]*

CV 411.77 Liability of owner present in vehicle but not the operator *[Rev. 4/28/18]*

CV 411.79 Liability of parent/guardian/other responsible person *[Rev. 4/28/18]*

CV 411.01 Negligence distinguished from negligence as a matter of law *[Rev.12/6/14]*

COMMENT

A statute may either (1) describe a general standard of ordinary care that is a rule of conduct, or (2) define a specific, mandatory act or duty that is a *rule of law*. *Eisenhuth v. Moneyhon*, 161 Ohio St. 367 (1954).

Violation of a *rule of conduct* may constitute negligence and is one of the factors to be considered in deciding whether a person exercised due care under the circumstances.

Violation of a *rule of law* is negligence. It involves such a specific, singular, and identifiable act or omission (as distinguished from a general standard or *rule of conduct*) that the law recognizes and refers to its violation as negligence as a matter of law (or negligence per se).

1. NEGLIGENCE: A VIOLATION OF A RULE OF CONDUCT.

COMMENT

Statutory phrases such as "may cautiously enter the intersection" or "speed greater or less than is proper having due regard to traffic, etc." establish *rules of conduct*. In such cases a jury must first find whether a person has met the general standard of care, that is, the *rule of conduct*, before determining whether there is negligence. Therefore, instructions describing a *rule of conduct* should precede, or at least be given in conjunction with, instructions on negligence.

(A) DEGREE OF CARE. ("Due regard") ("Due care") ("Safely") ("Reasonably") means the degree of care that would be used by an ordinary and careful person in the same or similar circumstances to avoid injury to (himself/herself) (others).

(B) MAY ASSUME OTHERS WILL OBEY THE LAW. Every person may

assume that others will obey the law unless he/she has notice or knowledge that another person is proceeding in violation of law.

(Text continued on page 217)

2. NEGLIGENCE AS A MATTER OF LAW: A VIOLATION OF A RULE OF LAW.

COMMENT

Statutory phrases such as "failure to stop at a stop sign" or "driving on the left side of a roadway within 100 feet of the intersection" establish *rules of law*. In these cases, the trial judge should instruct the jury that committing or omitting a specific act is negligence.

The Committee throughout this chapter has identified each instance of a violation of a statutory *rule of law*.

(A) NEGLIGENCE PER SE. A person who violates a (statute) (law) (ordinance) that imposes a (mandatory) (specific) duty is negligent regardless of whether he/she used ordinary care.

COMMENT

There are exceptions to the application of the doctrine of negligence per se. See R.C. 4511.04 (highway maintenance workers), R.C. 4511.041 (emergency or public safety vehicle), and R.C. 4511.042 (coroner's vehicles). Also see OJI-CV 411.05 for a specific application of this exception for emergency or public safety vehicles.

CV 411.03 Failure to comply with the order or signal of police officer *[Rev. 12/6/14]*

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, failed to obey a lawful (order) (direction) (signal) of a police officer to (*describe order*) which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) a police officer who had the authority to (direct) (control) (regulate) traffic (issued an order) (gave a [direction] [signal]);

(B) the defendant, in the exercise of ordinary care, (heard) (saw) (understood) the (order) (direction) (signal) or should have (heard) (seen) (understood) the (order) (direction) (signal);

(C) the defendant failed to (comply with) (obey) the (order) (direction) (signal); and

(D) this failure proximately caused (injury) (damage) to the plaintiff.

COMMENT

See R.C. 4549.13 to .16 and Evid.R. 601(C) as to use of a uniform and a marked

car as prerequisites for competency of arresting officer to testify as a witness. *State v. Thobe*, 91 Ohio Law Abs.92 (2nd Dist. 1961); *Columbus v. Stump*, 41 Ohio App.2d 81 (1974); *Dayton v. Adams*, 9 Ohio St.2d 89 (1967).

3. VEHICLE. R.C. 4511.01.

4. NEGLIGENCE. If you find by the greater weight of the evidence that the plaintiff proved that the defendant failed to obey a lawful (order) (direction) (signal) of a police officer, this act is negligence.

5. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

6. CONCLUSION. OJI-CV Chapter 313.

7. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. DAMAGES. OJI-CV Chapter 315.

CV 411.05 Emergency vehicles going past red or stop signal R.C. 4511.03
[Rev. 12/6/14]

1. GENERAL. The plaintiff claims that the defendant, the driver of (an emergency) (a public safety) vehicle that was responding to an emergency call when approaching a (red or stop signal) (stop sign), failed to drive with due regard for safety to traffic which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the driver of (an emergency) (a public safety) vehicle responding to an emergency call;

(B) failed to drive with due regard for the plaintiff's safety;

(C) when approaching a (red or stop signal) (stop sign); and

(D) this failure proximately caused (injury) (damage) to the plaintiff.

3. EMERGENCY VEHICLE. R.C. 4511.01.

4. PUBLIC SAFETY VEHICLE. R.C. 4511.01.

5. EQUIPMENT. R.C. 4511.24, R.C. 4511.25.

6. EMERGENCY NOT DISPUTED (ADDITIONAL). It is not disputed that the vehicle was in public service, properly equipped, and operated during an emergency at the time of the accident.

7. EMERGENCY DISPUTED (ADDITIONAL). In deciding whether a vehicle was operated during an emergency, the test is whether the driver had reasonable grounds to believe there was an emergency to which he/she should respond in his/her line of duty.

8. DUTY OF DRIVER OF EMERGENCY VEHICLE. When approaching a (red or stop signal) (stop sign), the driver of (an emergency) (a public safety) vehicle responding to an emergency call must drive with due regard for safety to traffic.

COMMENT

Drawn from R.C. 4511.03, R.C. 4511.24, and R.C. 4511.45.

9. EMERGENCY CALL. "Emergency call" means a call to respond to (communications from citizens) (police dispatches) (personal observations by peace officers of inherently dangerous situations) (*describe other type of communication*) that demand an immediate response on the part of a (peace officer) (emergency medical personnel) (*describe other emergency responder*).

COMMENT

Drawn from R.C. 2744.01; *Colbert v. City of Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319.

10. WARNING LIGHT AND SIGNAL. If the driver of (an emergency) (a public safety) vehicle responding to an emergency call is using a (flashing) (rotating) (oscillating) light and sounding a (bell) (siren) (exhaust whistle), he/she may drive (in excess of the lawful rate of speed) (through a red light) (through a stop sign) (left of center) (*describe other act*) if he/she uses (ordinary care) (reasonable caution) (due regard) for the safety of all persons using the (street) (highway). Whether the driver proceeded cautiously and with due regard for safety of others is decided by the rule of ordinary care under the circumstances.

COMMENT

See Parton v. Weilnau, 169 Ohio St. 145 (1959); *City of Alliance v. Bush*, 5th Dist. Stark No. 2007CA00309, 2008-Ohio-3750.

It is not recommended that instructions include the type or visibility of the equipment unless it is an issue in a particular case.

11. LOSS OF EMERGENCY RIGHTS. If a driver of (an emergency) (a public safety) vehicle (proceeds when no reasonable grounds for emergency exist) (that makes no audible sound) (is not using a flashing, rotating, or oscillating light) when (approaching) (entering) an intersection, the driver (forfeits) (gives up) the rights of (an emergency) (a public safety) vehicle and must obey (*describe applicable traffic law*).

COMMENT

Drawn from R.C. 4511.03, R.C. 4511.24, R.C. 4511.45, and *Dayton v. Brennan*, 64 Ohio Law Abs. 525 (M.C. 1952).

12. GOVERNMENTAL LIABILITY. OJI-CV Chapter 425.

13. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

14. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

15. CONCLUSION. OJI-CV Chapter 313.

16. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

17. PROXIMATE CAUSE. OJI-CV Chapter 405.

18. DAMAGES. OJI-CV Chapter 315.

CV 411.07 Rules on private property R.C. 4511.08 ***[Rev. 12/6/14]***

COMMENT

R.C. 4511.08 authorizes an owner of private property to require additional conditions to those specified by law regarding the operation of vehicles on his or her private property.

This instruction is limited to circumstances where there is a regulation, sign, or traffic device posted on private property by the owner, the violation of which is at issue.

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle on private property used by the public with the owner's permission, negligently failed to obey a (regulation) (sign) (traffic device) posted by the property owner which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff you must find by the greater weight of the evidence that

(A) the defendant negligently operated a vehicle on private property used for vehicular traffic; and

(B) this negligence proximately caused (injury) (damage) to the plaintiff.

3. EFFECT OF PRIVATE REGULATIONS. A failure to obey a (regulation) (sign) (traffic device) posted by the owner on private property is not negligence by itself. In deciding whether the defendant was negligent, you may consider any such failure together with all the other facts and circumstances in evidence.

COMMENT

Burleson v. Midwest Transfer Co., 113 Ohio App. 199 (1st Dist. 1960).

4. VEHICLE. R.C. 4511.01.
5. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.
6. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.
7. CONCLUSION. OJI-CV Chapter 313.
8. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.
9. PROXIMATE CAUSE. OJI-CV Chapter 405.
10. DAMAGES. OJI-CV Chapter 315.

CV 411.09 Traffic control devices; signals R.C. 4511.12 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, failed to obey a traffic control (device) (signal) which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle on a roadway, failed to obey a traffic control (device) (signal); and

(B) this failure proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.
4. TRAFFIC CONTROL DEVICE. R.C. 4511.01.
5. TRAFFIC CONTROL SIGNAL. R.C. 4511.01.
6. NEGLIGENCE:

COMMENT

Drawn from R.C. 4511.13.

(*Use appropriate alternative*)

(A) STEADY RED SIGNAL. A driver of a vehicle facing a steady (circular red) (red arrow) signal indication, unless entering the intersection to make another movement permitted by another signal indication, (shall stop at a clearly marked stop line) (if there is no stop line, shall stop before entering the crosswalk on the near side of the intersection) (if there is no crosswalk, shall stop before entering the intersection) and shall remain stopped until a signal indication or other traffic

control device permitting the movement is displayed.

(*Use appropriate alternative*)

(1) CIRCULAR RED SIGNAL. The driver of a vehicle shall remain stopped until a signal indication to proceed is displayed, except when a traffic control device is in place prohibiting a turn on red, and is permitted to enter the intersection to turn right, or to turn left from a one-way street, after stopping. The failure to yield the right of way to any vehicle in the intersection or approaching in another roadway so close as to create an immediate risk of an accident is negligence.

(*or*)

(2) STEADY RED ARROW SIGNAL. When a traffic control device is in place permitting a turn on a steady red arrow signal indication, vehicular traffic facing a steady red arrow indication is permitted to enter the intersection to make the movement indicated by the arrow signal indication, after stopping. The right to proceed with the turn is limited to the direction indicated by the arrow and is subject to the provisions that are applicable after making a stop at a stop sign.

(*or*)

(3) Unless otherwise directed by a pedestrian signal indication or other traffic control device, pedestrians facing a steady circular red or steady red arrow signal indication shall not enter the roadway.

(*or*)

(4) Local authorities by ordinance, or the director of transportation on state highways, may prohibit a right or a left turn against a steady red signal at any intersection, which shall be effective when signs giving notice thereof are posted at the intersection.

(*or*)

(B) FLASHING YELLOW SIGNAL.

COMMENT

Drawn from R.C. 4511.13.

(*Use appropriate alternative[s]*)

(1)(a) Vehicular traffic, on an approach to an intersection, facing a flashing circular yellow signal indication, is permitted to cautiously enter the intersection to proceed straight through or turn right or left or make a u-turn movement except as such movement is modified by lane-use signs, turn prohibition signs, lane markings, roadway design, separate turn signal indications, or other traffic control devices. Such vehicular traffic, including vehicles turning right or left or making

a u-turn movement, shall yield the right of way to both of the following:

(i) pedestrians lawfully within an associated crosswalk; and

(ii) other vehicles lawfully within the intersection;

(1)(b) In addition, vehicular traffic turning left or making a u-turn to the left shall yield the right of way to other vehicles approaching from the opposite direction so closely as to constitute an immediate hazard during the time when such turning vehicle is moving across or within the intersection.

(*or*)

(2)(a) Vehicular traffic, on an approach to an intersection, facing a flashing yellow arrow signal indication, displayed alone or in combination with another signal indication, is permitted to cautiously enter the intersection only to make the movement indicated by such arrow, or other such movement as is permitted by other signal indications displayed at the same time. Such vehicular traffic, including vehicles turning right or left or making a u-turn, shall yield the right of way to both of the following:

(i) pedestrians lawfully within an associated crosswalk;

(ii) other vehicles lawfully within the intersection.

(2)(b) In addition, vehicular traffic turning left or making a u-turn to the left shall yield the right of way to other vehicles approaching from the opposite direction so closely as to constitute an immediate hazard during the time when such turning vehicle is moving across or within the intersection;

(*or*)

(3) Pedestrians facing any flashing yellow signal indication at an intersection, unless otherwise directed by a pedestrian signal indication or other traffic control device, are permitted to proceed across the roadway within any marked or unmarked associated crosswalk. Pedestrians shall yield the right of way to vehicles lawfully within the intersection at the time that the flashing yellow signal indication is first displayed;

(*or*)

(4) When a flashing circular yellow signal indication is displayed as a beacon to supplement another traffic control device, road users are notified that there is a need to pay additional attention to the message contained thereon or that the regulatory or warning requirements of the other traffic control device, which might not be applicable at all times, are currently applicable.

(*or*)

(C) STOP SIGNS/FLASHING RED STOP SIGNAL.

COMMENT

Drawn from R.C. 4511.43, R.C. 4511.13.

(*Use appropriate alternative[s]*)

(1) A driver of a vehicle approaching a (stop sign) (flashing red stop signal) must stop (at a clearly marked stop line) (before entering the crosswalk on the near side of the intersection) (at a point nearest the intersecting roadway where the operator has a view of approaching traffic) before entering the intersection. A failure to stop is negligence;

COMMENT

The Committee believes that this conduct is negligence *per se*. *See* OJI-CV 411.01.

(*or*)

(2) After stopping, the driver must yield the right of way to any vehicle in the intersection or approaching in another roadway so close as to (cause) (create) an immediate (hazard) (risk of accident) during the time the driver is (moving) (traveling) across or within the (intersection) (junction of roadways);

COMMENT

The Committee believes that this conduct is a violation of a rule of conduct that may constitute negligence. *See* OJI-CV 411.01.

7. ROADWAY. R.C. 4511.01.

8. STOPPING OR SLOWING AT YIELD SIGN. Before entering the intersection, the driver of a vehicle approaching a yield sign must slow down to a speed reasonable under the existing conditions, and if required for safety to stop, the driver must stop (at a clearly marked stop line) (before entering the crosswalk on the near side of the intersection) (at a point nearest the intersecting roadway where the driver has a view of approaching traffic). After (slowing) (stopping), the driver must yield the right of way to any vehicle (in the intersection) (approaching on another roadway so closely as to [cause] [create] an immediate hazard) during the time the driver is moving across or within the (intersection) (junction of roadways).

9. STOPPING AT STOP SIGNS. A driver of a vehicle approaching a stop sign must stop (at a clearly marked stop line) (before entering the crosswalk on the near side of the intersection) (at a point nearest the intersecting roadway where the operator has a view of approaching traffic) before entering the intersection. After stopping, the driver must yield the right of way to any vehicle in the intersection or approaching in another roadway so close as to (cause) (create) an immediate (hazard) (risk of accident) during the time the driver is (moving) (traveling) across or within the (intersection) (junction of roadways).

COMMENT

The Committee believes that failure to stop at a stop sign is negligence. *See* OJI-CV 411.01.

This instruction does not apply to a four-way stop.

The facts in each case will determine which of the above three places of stopping set forth in R.C. 4511.43(A) shall be used in the instruction.

10. FLASING RED STOP SIGNAL. A driver facing a flashing red stop signal before entering the intersecting roadway shall stop

(*Use appropriate alternative*)

(A) at a clearly marked stop line.

(*or*)

(B) before entering the crosswalk on the near side of the intersection.

(*or*)

(C) at the point nearest the intersecting roadway where the driver has a view of approaching traffic.

(*or*)

(D) before proceeding he must yield the right of way to all other vehicles not required to stop.

COMMENT

See OJI-CV 411.75 § 1, which describes the duty at a stop sign. The same duty applies to R.C. 4511.15(A).

The Committee believes that failure to stop at a stop sign is negligence. The above instruction that its violation is negligence has therefore been added. *See* OJI-CV 411.01.

11. FLASHING YELLOW CAUTION SIGNAL. A driver facing a flashing yellow caution signal may go (through the intersection) (past the signal) with caution. He/she must continue to use ordinary care for the safety and right of all (persons) (vehicles) on the roadway while he/she is going (through the intersection) (past the signal).

12. NEGLIGENCE.

13. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

14. CONCLUSION. OJI-CV Chapter 313.

15. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

16. PROXIMATE CAUSE. OJI-CV Chapter 405.

17. DAMAGES. OJI-CV Chapter 315.

CV 411.11 Changing signal lights R.C. 4511.13 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, failed to use ordinary care in an intersection with a changing signal light which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle(,)

(*Use appropriate alternative*)

(1) facing a circular green signal, (traveled into and straight through the intersection) (turned right or left) and failed to yield the right of way to the plaintiff who was already lawfully within the (intersection) (adjacent crosswalk) when the green light was exhibited;

(*or*)

(2) facing a green arrow signal (alone) (in combination with another indication), failed to cautiously enter the intersection and yield the right of way to the plaintiff who was lawfully using the intersection;

(*or*)

(3) facing a steady red signal alone, failed to stop (at a clearly marked stop line) (before entering the intersection);

(*or*)

(4) after stopping at a red light signal and making a right hand turn, failed to yield the right of way to the plaintiff who was lawfully using the intersection (unless there is a sign that prohibits a right turn);

(*or*)

(5) after stopping at a red light signal and making a left turn from a one way street onto another one way street on which the traffic moves left, failed to yield the right of way to the plaintiff who was lawfully using the intersection (unless there is a sign that prohibits a left turn);

(*or*)

(6) when entering an intersection with a steady yellow signal failed to yield the right of way to the plaintiff who was lawfully already in the intersection;

(*or*)

(7) facing a flashing red stop signal, failed to yield the right of way to the plaintiff by (not stopping at a clearly marked stop line) (not stopping before the crosswalk

on the near side of the intersection) (not stopping at the point nearest the intersecting roadway where the driver has a view of approaching traffic);

(*or*)

(8) facing a flashing yellow caution signal, failed to use ordinary care for the safety and right of the plaintiff while going (through the intersection) (past the signal);

(*or*)

(9) (traveled) (entered) into a lane of traffic with a steady red "X" over the lane;

(*or*)

(10) (traveled) (entered) into a lane of traffic with a flashing yellow "X" and failed to use proper caution in the lane while making a left turn;

(*or*)

(11) (entered) (traveled into) an intersection when the plaintiff was in the intersection at the time the traffic control signal changed and failed to yield the right of way to the plaintiff; and

(B) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. RIGHT OF WAY. "Right of way" means the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it is moving in preference to another vehicle approaching from a different direction into its path.

COMMENT

Drawn from R.C. 4511.01.

5. IN A LAWFUL MANNER. To keep his/her right of way as a preferred party to continue to travel uninterruptedly, the driver must operate his/her vehicle in a lawful manner. If he/she does not do so, he/she loses the right of way and his/her status as the preferred party.

COMMENT

The preferred party has an absolute right of way unless he violates a *statute*. He cannot lose his right of way by failure to use ordinary care and such instruction to a jury is error. *Deming v. Osinski*, 24 Ohio St.2d 179 (1970).

6. LOSS OF RIGHT OF WAY. If a preferred party loses the right of way by not

proceeding in a lawful manner, each party then must use ordinary care under the circumstances.

COMMENT

Drawn from *Deming v. Osinski*, 24 Ohio St.2d 179 (1970).

7. NEGLIGENCE. If you find by the greater weight of the evidence that the defendant (violated the steady red 'X' control signal) (violated the flashing red stop signal) (violated the steady red signal) (*describe other violation*), the defendant was negligent.

8. ORDINARY CARE. OJI-CV Chapter 401.

9. REVERSIBLE LANE. Where the direction of traffic in a lane is reversed (during certain periods of the day), the appropriate form for the control device is a lane-use control signal placed over the traffic lane to which it applies.

COMMENT

Drawn from R.C. 4511.131.

10. STEADY DOWNWARD GREEN ARROW. If there is a lane-use control signal with a steady green arrow pointing downward over a lane, vehicular traffic may proceed and travel in such lane.

COMMENT

Drawn from R.C. 4511.131(A).

11. STEADY YELLOW "X." If there is a lane-use control signal with a steady yellow "X," vehicular traffic is warned to vacate in a safe manner any lane over which such signal is shown and to avoid occupying the lane when a steady red "X" signal is shown.

COMMENT

Drawn from R.C. 4511.131(B).

12. STEADY RED "X." If there is a lane-use control signal with a steady red "X" over a lane, (vehicular traffic) is prohibited from (entering) (traveling) in such lane.

COMMENT

Drawn from R.C. 4511.131(E).

13. CONCLUSION ON LAWFUL MANNER. If you find that the defendant was not (traveling) (driving) (walking) in a lawful manner, then he/she (did not have) (lost) the right of way and was not entitled to any preference over the other (driver) (party). In that event the defendant was not required to yield the right of way, and the parties have equal rights and each must use ordinary care under the circumstances. If you find that the defendant was (traveling) (driving) (walking) in a lawful manner, then he/she (had) (did not lose) the right of way and the defendant was required to yield the right of way to him/her.

14. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

15. CONCLUSION. OJI-CV Chapter 313.

16. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

17. PROXIMATE CAUSE. OJI-CV Chapter 405.

18. DAMAGES. OJI-CV Chapter 315.

CV 411.13 Operation in willful or wanton disregard of the safety of persons or property R.C. 4511.20 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims the defendant operated a vehicle in willful or wanton disregard of the safety of the plaintiff or his/her property which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant operated a vehicle;

(B) on (a street) (a highway) ([public] [private] property);

(C) with willful or wanton disregard for the safety of the plaintiff's (person) (property); and

(D) this negligence proximately caused (injury) (damage) to the plaintiff.

COMMENT

Jarrell v. Woodland Mfg. Co., 7 Ohio App. 3d 320 (1982). Willful or wanton misconduct is negligence as a matter of law.

3. VEHICLE. R.C. 4511.01.

4. STREET OR HIGHWAY. "Street" or "highway" means the entire width between

the boundary lines of every way open to the use of the public as a thoroughfare for purposes of vehicular travel.

COMMENT

R.C. 4511.01.

5. PRIVATE ROADWAYS. OJI-CV 411.13, OJI-CV 411.29.

COMMENT

It is not negligence per se if the willful or wanton operation occurs during the competitive operation of vehicles on public or private property with the knowing permission of the owner. This does not mean that the operation may not constitute negligence.

6. WILLFUL MISCONDUCT. OJI-CV 401.41.

7. WANTON MISCONDUCT. OJI-CV 401.41.

8. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

9. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

10. CONCLUSION. OJI-CV Chapter 313.

11. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

12. PROXIMATE CAUSE. OJI-CV Chapter 405.

13. DAMAGES. OJI-CV Chapter 315.

CV 411.15 Reasonable control of vehicle R.C. 4511.202 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant operated a vehicle without reasonable control which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant operated a vehicle on a (street) (highway) (property open to the public for vehicular traffic);

(B) without being in reasonable control of the vehicle; and

(C) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. REASONABLE CONTROL. "Reasonable control" means the control or care that a (cautious) (careful) person would use under the same or similar circumstances.

COMMENT

Drawn from R.C. 4511.202.

5. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

6. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

7. CONCLUSION. OJI-CV Chapter 313.

8. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

CV 411.17 Speed R.C. 4511.21 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant operated a vehicle at an (unreasonable) (improper) speed which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant operated a vehicle at a speed that was too (fast) (slow);

(B) having due regard to (traffic) (surface and the width of the street or highway) (*specify other conditions or circumstances*); and

(C) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. REASONABLE OR PROPER SPEED. A driver must operate his/her vehicle at a (reasonable) (proper) speed, neither too fast nor too slow, having due regard to the traffic, surface, and width of the street or highway and to any other (conditions) (circumstances).

You may consider speed in excess of a posted speed limit may be considered by you in deciding whether the defendant was negligent. A greater or lesser speed per hour may be reasonable or proper depending upon all the conditions. You must decide from all the facts and circumstances, including the speed at which the defendant operated his/her motor vehicle, whether the defendant exercised ordinary care.

5. FACTORS AND CONSIDERATIONS. In deciding whether the speed of the driver was reasonable or proper, you must consider the permanent physical features of the scene, the hour of day or night, the extent of other traffic, the width and nature of the roadway, and any other conditions existing at that time of the accident.

COMMENT

See *Gutter v. Frazer*, 120 Ohio App. 305 (1963). *See also* R.C. 4511.21(B) as

to prima facie lawful speed.

6. OBSTRUCTED VISION (ADDITIONAL). If a driver's vision is completely obscured, it is his/her duty in the exercise of ordinary care to slow down or stop, if necessary, until his/her vision is at least in part restored.

7. IMPEDE OR BLOCK TRAFFIC (ADDITIONAL). A driver must not operate his/her vehicle at a speed so slow as to impede or block the normal and reasonable movement of traffic, except when a reduced speed is necessary for safe operation or to comply with the law. Before you may find the defendant negligent because of slow speed, you must find by the greater weight of the evidence that the slow speed impeded or blocked the normal and reasonable movement of traffic and that such slow speed was (not otherwise required by law) (not necessary in the use of ordinary care for the safety of the defendant and other users of the highway).

COMMENT

Drawn from R.C. 4511.22(A). See also *Foureman v. McCarter*, 105 Ohio App. 231 (1957).

8. CONTROLLED ACCESS HIGHWAY, EXPRESSWAY, OR FREEWAY (ADDITIONAL). If a minimum speed limit is established on a (controlled access highway) (expressway) (freeway) and signs are posted to that effect, a driver of a vehicle must not operate a vehicle at less than (*specify the minimum speed*). A lower speed is negligence unless (otherwise required by law) (necessary in the use of ordinary care for the safety of the defendant and other users of the highway).

9. CONTROLLED ACCESS HIGHWAY. R.C. 4511.01.

10. EXPRESSWAY. R.C. 4511.01.

11. FREEWAY. R.C. 4511.01.

12. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

13. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

14. CONCLUSION. OJI-CV Chapter 313.

15. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

16. PROXIMATE CAUSE. OJI-CV Chapter 405.

17. DAMAGES. OJI-CV Chapter 315.

CV 411.19 Assured clear distance R.C. 4511.21 ***[Rev. 12/6/14]***

COMMENT

See also OJI-CV 411.39; R.C. 4511.34.

1. GENERAL. The plaintiff claims that the defendant operated a vehicle at a greater speed than permitted him/her to bring it to a stop within the assured clear distance ahead which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant operated a vehicle at a speed greater than would permit the defendant to stop his/her vehicle within an assured clear distance ahead; and

(B) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. ASSURED CLEAR DISTANCE AHEAD. "Assured clear distance ahead" means the distance between the vehicle the defendant is operating and a reasonably discernible object in his/her path of travel. This distance constantly changes and is measured at any moment considering the (limit of his/her vision) (range of his/her headlights).

COMMENT

R.C. 4511.21(A). See also *Tomlinson v. Cincinnati*, 4 Ohio St.3d 66 (1983), regarding general discussion and particularly the confirmation of *Blair v. Goff-Kirby Co.*,49 Ohio St.2d 5 (1976).

5. DISCERNABLE OBJECT. "A discernible object" is a reasonably visible object. An object is discernible when it is visible or can be detected or perceived.

COMMENT

Sauer v. Crews, 10th Dist. Franklin No. 10AP-834, 2011-Ohio-3310.

6. OBSTRUCTION OF VIEW (ADDITIONAL). Where there is (a curve) (a hill) (fog) (rain) (*specify other obstruction of view or vision*) that is (in) (on) the highway, the assured clear distance is that distance between the defendant and the point where his/her vision ends or is cut off. In that event, the defendant must drive at such a speed that he/she can stop within the distance between him/her and the point where his/her vision ends.

COMMENT

Cerny v. Domer, 13 Ohio St.2d 117 (1968).

7. SUDDEN STOP (ADDITIONAL). The defendant is not excused from maintain-

ing an assured clear distance if the vehicle ahead in the same lane of travel stops suddenly.

COMMENT

Drawn from *Cox v. Polster*, 174 Ohio St. 224 (1963); *Bickel v. American Can Co.*, 154 Ohio St. 380 (1950).

Skidding because of the slickness of the street is not an excuse. *Ventress v. Frambes*, 176 Ohio St. 337 (1964).

8. EXCEPTION TO ASSURED CLEAR DISTANCE: SUDDEN ENTRANCE (ADDITIONAL). If you find that the defendant's assured clear distance ahead was suddenly (cut down) (reduced) by the entrance of (the plaintiff) (another vehicle) (a pedestrian) into his/her path or lane of travel and within such assured clear distance ahead, then the assured clear distance law does not apply.

COMMENT

Drawn from *Smiley v. Arrow Spring Bed Co.*, 138 Ohio St. 81 (1941).

9. NEGLIGENCE. If you find by the greater weight of the evidence that the defendant violated the assured clear distance law, you must find that the defendant was negligent.

10. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

11. CONCLUSION. OJI-CV Chapter 313.

12. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

13. PROXIMATE CAUSE. OJI-CV Chapter 405.

14. DAMAGES. OJI-CV Chapter 315.

CV 411.21 Failure to drive on right side of roadway R.C. 4511.25 *[Rev. 12/6/14]*

1. GENERAL. The plaintiff claims that the defendant failed to operate a vehicle on the right side of the roadway which proximately caused (injury) (damage) to the plaintiff.

COMMENT

Drawn from *Zehe v. Falkner*, 26 Ohio St.2d 258 (1971).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant failed to drive on the right side of the roadway; and

(B) that failure which proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. EXCEPTIONS (ADDITIONAL). Drivers may drive on the left side of the roadway when

(*Use appropriate alternative[s]*)

COMMENT

The following exceptions are drawn from R.C. 4511.25.

(A)(1) overtaking and passing another vehicle going in the same direction or when making a lawful left turn;

COMMENT

R.C. 4511.36 outlines rules for making a left turn at an intersection.

(*or*)

(A)(2) there is an obstruction on the right side of the roadway that makes it necessary to drive to the left, but he/she must yield the right of way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;

COMMENT

The Committee believes that the right to drive to the left under such conditions is limited to the distance reasonably necessary to pass the obstruction. R.C. 4511.29.

(*or*)

(A)(3) such travel is permitted on a three-lane roadway;

(*or*)

(A)(4) driving on a roadway designated and posted with signs for one-way traffic;

(*or*)

(A)(5) permitted by a police officer's direction or by a traffic control device;

(*or*)

(A)(6) making a left turn into or from an alley, private road, or driveway.

5. EXCEPTIONS PROHIBITED (OPTIONAL). A driver of a vehicle must not drive on the left side of the roadway when

(*Use appropriate alternative*)

(A) (approaching the crest of a grade) (on a curve in the highway) where his/her view is obstructed within such a distance as to create a hazard in the event traffic might approach from the opposite direction.

(*or*)

(B) his/her view is obstructed when approaching within one hundred feet of any (bridge) (viaduct) (tunnel).

(*or*)

(C) (approaching within one hundred feet of) (traversing) any (intersection) (railroad grade crossing).

COMMENT

The above exceptions are drawn from R.C. 4511.30.

6. SLOWER MOVING VEHICLES (OPTIONAL). A driver of a vehicle traveling at a speed less than the prevailing and lawful speed of traffic under the conditions then existing must drive in the right-hand lane and far enough to the right to allow safe and reasonable passing by faster vehicles except when (overtaking and passing another vehicle proceeding in the same direction) (preparing for a left turn) (the driver must necessarily drive in a lane other than the right-hand lane to continue on his/her intended route) (driving on the far right side would compromise his/her safety to allow overtaking by a faster vehicle).

COMMENT

Drawn from R.C. 4511.25(B).

7. FOUR OR MORE LANES. On roadways having four or more lanes and providing for two-way traffic, a driver of a vehicle must not drive left of the center line (except when authorized by traffic control devices designating certain lanes left of center for traffic not otherwise permitted) (except when there is an obstruction on the right side of the roadway).

COMMENT

Drawn from R.C. 4511.25(C).

8. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

9. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

10. CONCLUSION. OJI-CV Chapter 313.

11. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

12. PROXIMATE CAUSE. OJI-CV Chapter 405.

13. DAMAGES. OJI-CV Chapter 315.

CV 411.23 Street racing R.C. 4511.251 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant negligently (participated) (assisted) in street racing which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant (participated) (assisted) in street racing on a public road, street, or highway; and

(B) this negligence proximately (injured) (damaged) the plaintiff.

3. STREET RACING. R.C. 4511.251.

COMMENT

Competitive racing on public roads is governed by R.C. 4511.252. Any claim arising from competitive racing on public roads is governed by the standards of negligence and ordinary care, not negligence per se.

4. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

5. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

6. CONCLUSION. OJI-CV Chapter 313.

7. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. DAMAGES. OJI-CV Chapter 315.

CV 411.25 Vehicles traveling in opposite directions R.C. 4511.26 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle,

failed to give one-half of the main traveled (highway) (roadway) to the plaintiff which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle, failed to give the plaintiff one-half of the main traveled portion of the (highway) (roadway) or as nearly one-half as was reasonably possible; and

(B) this failure proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

5. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

6. CONCLUSION. OJI-CV Chapter 313.

7. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. DAMAGES. OJI-CV Chapter 315.

CV 411.27 Overtaking and passing R.C. 4511.27 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, negligently overtook and passed the plaintiff resulting in a collision which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant negligently overtook and passed the plaintiff by (*describe defendant's conduct*); and

(B) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. DUTY WHEN OVERTAKING AND PASSING. A driver of a vehicle going in the same direction must signal in a manner sufficient to notify the vehicle being overtaken, must pass to the left side at a safe distance, and must not return to the right side of the roadway until safely clear of the overtaken vehicle.

COMMENT

Drawn from R.C. 4511.27(A)(1); *Wilfong v. Batdorf*, 6 Ohio St.3d 100 (1983), overruled on other grounds by *Van Fossen v. Babcock*, 36 Ohio St.3d 100 (1988).

5. OVERTAKING AND PASSING ON THE RIGHT. The driver of a vehicle may overtake and pass another vehicle to the right side only

(*Use appropriate alternative*)

(A) when the vehicle overtaken is making or about to make a left turn.

(*or*)

(B) when on a roadway with two or more lanes of travel in the same direction where there is unobstructed pavement wide enough for both vehicles to permit passing.

COMMENT

Drawn from R.C. 4511.28(A)(1) and (2).

6. SAFETY. Such overtaking and passing is only permitted where such movement can be made safely. (The passing may not be made by driving off the roadway.)

COMMENT

Drawn from R.C. 4511.28(B). This subsection applies only to "overtaking and passing on the right."

7. AUDIBLE SIGNAL NOT NECESSARY (ADDITIONAL). The driver of a vehicle overtaking and passing another vehicle that is proceeding in the same direction on a (divided highway) (limited access highway) (highway with four or more lanes) is not required to signal audibly to the vehicle being overtaken and passed.

COMMENT

Drawn from R.C. 4511.27(A)(3).

8. DUTY WHILE DRIVING LEFT OF CENTER. A driver of a vehicle must not drive to the left of the center of the roadway in overtaking traffic unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such (overtaking) (passing) to be completely made, without interfering with the safe operation of (traffic approaching from the opposite direction) (any vehicle being overtaken).

COMMENT

Drawn from R.C. 4511.29(A).

9. RETURNING TO RIGHT LANE. After passing another vehicle, the driver of the

overtaking vehicle must return to an authorized lane of travel as soon as safely possible. If passing involves using a lane authorized for traffic approaching from the opposite direction, such driver must return to the proper lane of travel before approaching within two hundred feet of any approaching vehicle.

COMMENT

R.C. 4511.29(A).

10. PASSING SCHOOL BUS PROHIBITED. R.C. 4511.75.

11. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

12. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

13. CONCLUSION. OJI-CV Chapter 313.

14. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

15. PROXIMATE CAUSE. OJI-CV Chapter 405.

16. DAMAGES. OJI-CV Chapter 315.

CV 411.29 Failure to give right of way by overtaken vehicle R.C. 4511.27
[Rev. 12/6/14]

1. GENERAL. The plaintiff claims that, while he/she was passing the defendant, the defendant negligently failed to give way to the right in favor of the plaintiff which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant (failed to give way to the right in favor of the plaintiff who was overtaking the defendant after an audible signal from the plaintiff) (increased his/her speed before the plaintiff, in overtaking the defendant, completely passed the defendant); and

(B) this negligence proximately caused (injury) (damage) to the plaintiff.

COMMENT

Drawn from R.C. 4511.27(A)(2).

3. VEHICLE. R.C. 4511.01.

4. NEGLIGENCE. If you find by the greater weight of the evidence that the defendant (failed to give way to the right in favor of the plaintiff, who was overtaking the defendant after an audible signal from the plaintiff) (increased his/her speed before

the plaintiff completely overtook and passed the defendant), you must find that the defendant was negligent.

5. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

6. CONCLUSION. OJI-CV Chapter 313.

7. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. DAMAGES. OJI-CV Chapter 315.

CV 411.31 Driving left of center line R.C. 4511.29 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, negligently drove on the left side of the roadway which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle, drove on the left side of the roadway when

(*Use appropriate alternative*)

(1) (approaching the crest of a grade) (on a curve in the highway) where his/her view was obstructed within such a distance as to create a hazard in the event traffic might approach from the opposite direction; and

(*or*)

(2) his/her view was obstructed when approaching within one hundred feet of any (bridge) (viaduct) (tunnel); and

(*or*)

(3) (approaching within one hundred feet of) (traversing) any (intersection) (railroad grade crossing); and

(B) this negligence proximately caused (injury) (damage) to the plaintiff.

COMMENT

Violation of (B) is negligence, and the jury should be so instructed. *See Chambers v. McFerren* (1950), 168 Ohio St. 398; *Mann v. Lewis* (1970), 22 Ohio St.2d 191.

3. EXCEPTION (ADDITIONAL).

COMMENT

In the appropriate case there may be an exception to this rule. *See* R.C.

4511.25(A). *See also Van Jura v. Row* which holds that the friendly motions of a driver of the forward car waving to the driver of the following car to pass where passing is prohibited will not excuse a statutory traffic violation. *Van Jura v. Row*, 175 Ohio St. 41(1963).

4. VEHICLE. R.C. 4511.01.

5. ROADWAY. R.C. 4511.01.

6. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

7. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

8. CONCLUSION. OJI-CV Chapter 313.

9. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

10. PROXIMATE CAUSE. OJI-CV Chapter 405.

11. DAMAGES. OJI-CV Chapter 315.

CV 411.33 Hazardous zones R.C. 4511.31 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle when (overtaking and passing other traffic) (driving left of [center] [centerline]), failed to obey a (sign) (marking) that was clearly visible on the highway indicating the beginning and end of a hazardous zone, which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle on a highway, (overtook and passed traffic) (drove left of the [center] [centerline]);

(B) the defendant failed to obey any (sign) (marking) that was placed and clearly visible on the highway indicating the beginning and end of a hazardous zone; and

(C) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. NEGLIGENCE. If you find by the greater weight of the evidence that the defendant violated the duty to obey a (sign) (marking) placed and clearly visible on the highway indicating the beginning and end of a hazardous zone, this is negligence.

5. EXCEPTION (ADDITIONAL).

COMMENT

In the appropriate case there may be an exception to this rule. *See* R.C. 4511.31(B).

6. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

7. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

8. CONCLUSION. OJI-CV Chapter 313.

9. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

10. PROXIMATE CAUSE. OJI-CV Chapter 405.

11. DAMAGES. OJI-CV Chapter 315.

CV 411.35 One-way highways R.C. 4511.32 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle in the wrong direction on a posted one-way (street) (highway) (roadway), proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle on a (street) (roadway) (highway) posted with signs for one-way traffic;

(B) drove in the wrong direction; and

(C) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

5. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

6. CONCLUSION. OJI-CV Chapter 313.

7. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. DAMAGES. OJI-CV Chapter 315.

CV 411.37 Driving in marked lanes R.C. 4511.33 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, negligently failed to drive within a single (marked lane) (line) of traffic which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle, failed to drive entirely in a single (marked lane) (line); and

(B) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. OPERATING. R.C. 4511.01.

5. THREE LANES. When a roadway is divided into three lanes and two-way traffic is permitted, a driver must not operate his/her vehicle in the center lane except

(*Use appropriate alternative*)

(A) when overtaking and passing another vehicle where the roadway is clearly visible and the center lane is clear of traffic within a safe distance.

(*or*)

(B) when preparing for a left turn.

(*or*)

(C) where the center lane is posted with signs that exclusively limit traffic to move in the same direction in which the (vehicle) (trackless trolley) is going.

COMMENT

R.C. 4511.33(B).

6. SIGNS—NEGLIGENCE (ADDITIONAL). The driver of a vehicle must obey the directions of signs (directing specified traffic to use a designated lane) (directing which lanes traffic moving in a particular direction must use).

COMMENT

The Committee believes that a violation of this section is a violation of a rule of law. *See* OJI-CV 411.01.

7. CHANGING LANES PROHIBITED (ADDITIONAL). The driver of a vehicle must obey any official traffic control device that prohibits the changing of lanes on sections of a roadway.

COMMENT

The Committee believes that a violation of this section is a violation of a rule of law. *See* OJI-CV 411.01.

8. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

9. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

10. CONCLUSION. OJI-CV Chapter 313.

11. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

12. PROXIMATE CAUSE. OJI-CV Chapter 405.

13. DAMAGES. OJI-CV Chapter 315.

CV 411.39 Space between moving vehicles R.C. 4511.34 *[Rev. 12/6/14]*

COMMENT

See also OJI-CV 411.19; R.C. 4511.21.

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, followed another vehicle too closely which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle, followed another vehicle more closely than was reasonable and prudent (or careful) in regard to speed, traffic, and the condition of the highway; and

(B) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. TRUCKS OUTSIDE BUSINESS OR RESIDENCE DISTRICT (ADDITIONAL). The driver of any (truck) (vehicle drawing another vehicle), when traveling upon a roadway outside a (business) (residence) district, must maintain a sufficient space, whenever conditions permit, between such vehicle and another vehicle ahead so that an overtaking vehicle may enter and occupy such space without danger.

COMMENT

Drawn from R.C. 4511.34.

This instruction does not apply to any lane specially designated for use by trucks. This duty does not prevent overtaking and passing.

5. TRUCKS OUTSIDE MUNICIPAL CORPORATION (ADDITIONAL). Outside a municipal corporation, the driver of a (truck) (vehicle drawing another vehicle), while ascending to the crest of a grade beyond which the driver's view of the roadway is obstructed, must not follow within three hundred feet of another (truck) (vehicle drawing another vehicle).

COMMENT

The Committee believes that a violation of this section is a violation of a rule of law. *See* OJI-CV 411.01.

This instruction does not apply to any lane specially designated for use by trucks.

6. CARAVAN OUTSIDE BUSINESS OR RESIDENCE DISTRICT (ADDITIONAL). Vehicles operated outside of a (business) (residence) district in a (caravan) (motorcade) must maintain sufficient space between such vehicles so that an overtaking vehicle may enter and occupy such space without danger.

COMMENT

R.C. 4511.34.

7. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.
8. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.
9. CONCLUSION. OJI-CV Chapter 313.
10. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.
11. PROXIMATE CAUSE. OJI-CV Chapter 405.
12. DAMAGES. OJI-CV Chapter 315.

CV 411.41 Divided highways R.C. 4511.35 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle on a divided roadway, negligently (failed to drive on the right hand roadway) (drove [over] [across] [within] a [dividing space] [barrier] [section]) which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle on a highway divided into two roadways by (an intervening space) (a physical barrier) (a clearly indicated dividing section constructed to impede vehicular traffic);

(B) negligently failed to drive (only on the right hand roadway) (through [an opening] [a cross over] [an intersection] established by public authority); and

(C) this failure proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. DIVIDED HIGHWAY NEGLIGENCE. Failure to drive on the right hand roadway on a divided road or failing to drive through (an opening) (a cross over) (an intersection) established by public authority is negligence.

COMMENT

The Committee believes that a violation of this section is a violation of a *rule*

of law. The above instruction that its violation is negligence has therefore been added. *See* OJI-CV 411.01.

5. EMERGENCY. Vehicles may (occupy) (use) such (dividing space) (barrier) (section) in (order to make an emergency stop) (compliance with an order by a police officer).

COMMENT

Drawn from R.C. 4511.01.

6. ROADWAY. R.C. 4511.01.

7. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

8. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

9. CONCLUSION. OJI-CV Chapter 313.

10. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

11. PROXIMATE CAUSE. OJI-CV Chapter 405.

12. DAMAGES. OJI-CV Chapter 315.

CV 411.43 Turns at intersections R.C. 4511.36 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, negligently turned at an intersection which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle and turning right at an intersection;

(B) negligently failed to make the turning movement as close as practicable to the (right hand curb) (right edge of the roadway); and

(C) this negligence proximately caused (injury) (damage) to the plaintiff.

COMMENT

R.C. 4511.36(A)(1).

3. TRAFFIC MOVING IN BOTH DIRECTIONS (ADDITIONAL). An approach for a left turn shall be made in the portion of the right half of the roadway nearest the centerline and by passing to the right of such centerline where it enters the intersection

and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the centerline of the roadway being entered. Whenever practicable the left turn shall be made in that portion of the intersection to the left of the center of the intersection.

COMMENT

Drawn from R.C. 4511.36(A)(2).

4. TRAFFIC RESTRICTED TO ONE DIRECTION (ADDITIONAL). When turning left at any intersection where traffic is restricted to one direction on one or more of the roadways, the driver shall approach the intersection in the extreme left-hand lane lawfully available to traffic moving in the direction of the travel of such vehicle, and after entering the intersection the left turn shall be made so as to leave the intersection, as nearly as practicable, in the left-hand lane of the roadway being entered lawfully available to traffic moving in that lane.

COMMENT

Drawn from R.C. 4511.36(A)(3).

5. VEHICLE. R.C. 4511.01.

6. NEGLIGENCE AND ORDINARY CARE. OJI-CV 401.01.

7. AUTHORITIES MAY REGULATE TRAFFIC (ADDITIONAL). The driver of a vehicle must obey (markers) (buttons) (signs) placed within or next to an intersection directing such driver to (travel a certain course) (turn at a certain place or in a certain manner).

COMMENT

Drawn from R.C. 4511.36(C).

8. INTERSECTION. R.C. 4511.01.

9. ROADWAY. R.C. 4511.01.

10. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

11. CONCLUSION. OJI-CV Chapter 313.

12. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

13. PROXIMATE CAUSE. OJI-CV Chapter 405.

14. DAMAGES. OJI-CV Chapter 315.

CV 411.45 U turn prohibited; turning in roadway R.C. 4511.37 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, negligently made a U turn which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle, negligently made a U turn (on any curve) (on the approach to or near the [crest of a grade] [top of the hill]) when the defendant's vehicle could not be seen within five hundred feet by the plaintiff when approaching the defendant's vehicle; and

(B) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. U TURN. "U turn" means a semicircular movement that when completed results in a vehicle going in the opposite direction from which it (came) (started).

5. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

6. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

7. CONCLUSION. OJI-CV Chapter 313.

8. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

CV 411.47 Starting and backing R.C. 4511.38 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims the defendant, while operating a vehicle, negligently (started) (backed) the vehicle which proximately caused (injury) (damage) to the plaintiff.

COMMENT

Buckeye Stages, Inc. v. Bowers, 129 Ohio St. 412 (1935); *Dickerhoff v. Athey*, 50 Ohio Law Abs. 430 (7th Dist.1947). R.C. 4511.38 does not apply to starting and backing on private property. *Buell v. Brunner*, 10 Ohio App.3d 41 (12th Dist.1983).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant operated a vehicle

(*Use appropriate alternative*)

(1) that was (stopped) (standing) (parked) and failed to use reasonable (safety) (care) before moving; and

(*or*)

(2) and before backing failed to give (ample) (sufficient) warning; and

(*or*)

(3) and before backing failed to (use caution) (be alert); and

(*or*)

(4) and backed up on a freeway; and

(B) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. FREEWAY. R.C. 4511.01.

5. NEGLIGENCE AND ORDINARY CARE. OJI-CV 401.01.

6. NEGLIGENT BACKING (ADDITIONAL). If you find by the greater weight of the evidence that the defendant operated a vehicle and before backing failed to give (ample) (sufficient) warning, you must find the defendant negligent.

COMMENT

Buckeye Stages, Inc. v. Bowers, 129 Ohio St. 412 (1935).

7. NEGLIGENT BACKING ON FREEWAY (ADDITIONAL). If you find by the greater weight of the evidence that the defendant backed on a freeway (and an exception does not apply), you must find the defendant negligent.

8. EXCEPTIONS TO BACKING ON A FREEWAY (ADDITIONAL). A driver may not back a vehicle on a freeway except

(*Use appropriate alternative*)

(A) in a rest area.

(*or*)

(B) in the performance of public works or official duties.

(*or*)

(C) as a result of an emergency caused by an accident.

(*or*)

(D) as a result of a breakdown of a vehicle.

COMMENT

R.C. 4511.38(A).

9. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

10. CONCLUSION. OJI-CV Chapter 313.

11. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

12. PROXIMATE CAUSE. OJI-CV Chapter 405.

13. DAMAGES. OJI-CV Chapter 315.

CV 411.49 Signals for turning R.C. 4511.39 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle on a highway, negligently (turned) (moved right or left) which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the defendant,

(A) while operating a vehicle and (turning) (moving right or left) on a highway,

(*Use appropriate alternative[s]*)

(1) failed to use (due) (ordinary) care to make sure the (turn) (movement) could be made with reasonable safety; and

(*or*)

(2) failed to continuously give a proper (hand and arm) (light) signal beginning at least one hundred feet prior to making the (turn) (movement) before (stopping) (decreasing speed); and

(B) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. TURN SIGNAL. "Signal light" means a light that clearly shows to both approaching and following traffic an intention to (turn) (move right or left).

COMMENT

Drawn from R.C. 4511.39.

5. HAND AND ARM SIGNAL (ADDITIONAL). A left turn is signaled by extending the hand and arm (horizontally) (straight out) from the left side of the vehicle. A right turn is signaled by extending the hand and arm upward from the left side of the vehicle. A stop or decrease in speed is signaled by extending the hand and arm downward from the left side of the vehicle.

COMMENT

Drawn from R.C. 4511.40.

R.C. 4511.39 prohibits use of hand and arm signals when operating certain specified vehicles. If the 24 inch and 14 feet requirements of R.C. 4511.39 are at issue, instructions should be modified accordingly.

6. NEGLIGENCE AND ORDINARY CARE. OJI-CV 401.01.

7. NEGLIGENCE: FAILURE TO USE SIGNAL (ADDITIONAL). If you find by the greater weight of the evidence that the defendant failed to continuously give a proper (hand and arm) (light) signal beginning at least one hundred feet prior to making the (turn) (movement) before (stopping) (decreasing speed), you must find the defendant negligent.

8. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

9. CONCLUSION. OJI-CV Chapter 313.

10. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

11. PROXIMATE CAUSE. OJI-CV Chapter 405.

12. DAMAGES. OJI-CV Chapter 315.

CV 411.51 Right of way; general *[Rev. 12/6/14]*

COMMENT

"Right of way" sections include R.C. 4511.41 through R.C. 4511.48 covering specific situations. The Committee believes that this topic is so extensive it should begin with the general introductory sections included in this instruction and suggest that the trial judge review OJI-CV 411.53 through OJI-CV 411.71 to determine which additional right of way section(s) apply.

1. RIGHT OF WAY. "Right of way" means the right of a driver of a vehicle to proceed without interruption in a lawful manner in the direction in which he/she is moving in preference to another vehicle approaching from a different direction into his/her path.

COMMENT

Drawn from R.C. 4511.01.

2. IN A LAWFUL MANNER. To keep his/her right of way to continue to travel without interruption, the driver must operate his/her vehicle in a lawful manner. If he/she does not do so, he/she loses the right of way.

COMMENT

A driver with the right of way has an absolute right of way unless he/she violates

a statute. He/She cannot lose his/her right of way by failure to use ordinary care, and such instruction to a jury is error. *Deming v. Osinski*, 24 Ohio St.2d 179 (1970).

3. LOSS OF RIGHT OF WAY. If a driver loses the right of way by not proceeding in a lawful manner, each party then must use ordinary care under the circumstances.

4. RIGHTS OF DRIVER WITH RIGHT OF WAY. The driver of a vehicle who has the right of way has the right to travel without interruption in a lawful manner. He/she has the right to rely upon his/her right of way, in the absence of contrary (notice) (knowledge), that others will fail to obey the law by (stopping) (yielding him/her the right of way) (not entering into his/her path of travel).

5. DUTY OF DRIVER WITHOUT RIGHT OF WAY. The driver of a vehicle who does not have the right of way must permit the other party to proceed without interruption. He/she must not move (into) (through) the (intersection) (highway) or that part of the (intersection) (highway) about to be occupied by the driver with the right of way, if such movement would (interrupt) (delay) (interfere with) the progress of that driver. The party who does not have the right of way must look at such times and places in a manner that will make his/her looking effective, and he/she must wait and travel at a speed slow enough to stop and avoid entering into the path of the approaching vehicle having the right of way.

6. CONCLUSION ON LAWFUL MANNER. If you find that the (plaintiff) (defendant) was not (traveling) (driving) (walking) in a lawful manner, then he/she (did not have) (lost) the right of way and was not entitled to any preference over the other (driver) (party). In that event the (plaintiff) (defendant) was not required to yield the right of way, the parties have equal rights and each must use ordinary care under the circumstances. If you find that the (plaintiff) (defendant) was (traveling) (driving) (walking) in a lawful manner, then he/she (had) (did not lose) the right of way and the (plaintiff) (defendant) was required to yield the right of way to him/her.

7. LAST CLEAR CHANCE.

COMMENT

The doctrine of "last clear chance" has merged into negligence with the enactment of comparative negligence. *Mitchell v. Ross*, 14 Ohio App.3d 75 (1984). What was historically "last clear chance" is now to be used in determining the percentage of negligence.

8. VEHICLES TO THE RIGHT (ADDITIONAL). When two vehicles approach or enter an intersection from different streets or highways at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. A failure to do so is negligence.

COMMENT

Drawn from R.C. 4511.41.

9. YIELDING TO ROADWAY TRAFFIC (ADDITIONAL). A driver of a vehicle about to (enter) (cross) a (street) (highway) from any place other than another roadway must yield the right of way to all traffic lawfully approaching on the roadway before (entering) (crossing) the (street) (highway). A failure to do so is negligence.

COMMENT

Drawn from R.C. 4511.44.

10. ROADWAY. R.C. 4511.01.

11. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

12. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

13. CONCLUSION. OJI-CV Chapter 313.

14. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

15. PROXIMATE CAUSE. OJI-CV Chapter 405.

16. DAMAGES. OJI-CV Chapter 315.

CV 411.53 Stopping at sidewalks in business or residence district R.C. 4511.431 *[Rev. 12/6/14]*

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, negligently failed to stop his/her vehicle prior to driving onto a (sidewalk) (sidewalk area extending across the alley) (building entrance) (road) (driveway) which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle and (emerging from) (coming out of) an (alley) (building) (private road) (driveway) within a (business) (residence) district;

(B) failed to stop his/her vehicle immediately prior to driving onto the (sidewalk) (sidewalk area extending across the alley) (building entrance) (road) (driveway) (area with no sidewalk to the point nearest the street which was entered where the defendant had a view of the approaching traffic); and

(C) this failure proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. SIDEWALK. R.C. 4511.01.

5. ROADWAY. R.C. 4511.01.

6. RIGHTS OF PEDESTRIANS. The driver of a vehicle must yield the right of way to any pedestrian on a sidewalk.

COMMENT

The Committee believes that a violation of this section is a violation of a rule of law.

The above instruction, that a violation is negligence, has therefore been added. *See* OJI-CV 411.01.

7. NEGLIGENCE. If you find by the greater weight of the evidence that the defendant failed to stop, the defendant is negligent.

8. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

9. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

10. CONCLUSION. OJI-CV Chapter 313.

11. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

12. PROXIMATE CAUSE. OJI-CV Chapter 405.

13. DAMAGES. OJI-CV Chapter 315.

CV 411.55 Pedestrians on sidewalk R.C. 4511.441 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, negligently failed to yield the right of way to plaintiff which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a motor vehicle, failed to yield the lawful right of way;

(B) to the plaintiff who was a pedestrian on a sidewalk; and

(C) this failure proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. RIGHT OF WAY. "Right of way" means the right of a driver of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which he/she/it is moving in preference to another vehicle approaching from a different direction into his/her/its path.

COMMENT

R.C. 4511.01.

5. IN A LAWFUL MANNER. To keep his/her right of way as a preferred party to continue to travel uninterruptedly, the driver must operate his/her vehicle in a lawful manner. If he/she does not do so, he/she loses the right of way and his/her status as the preferred party.

COMMENT

The preferred party has an absolute right of way unless he/she violates a *statute*. He/she cannot lose his right of way by failure to use ordinary care and such instruction to a jury is error. *Deming v. Osinski*, 24 Ohio St.2d 179 (1970).

6. LOSS OF RIGHT OF WAY. If a preferred party loses the right of way by not proceeding in a lawful manner, each party then must use ordinary care under the circumstances.

7. NEGLIGENCE. If you find by the greater weight of the evidence that the defendant failed to stop, the defendant is negligent.

8. SIDEWALK. R.C. 4511.01.

9. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

10. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

11. CONCLUSION. OJI-CV Chapter 313.

12. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

13. PROXIMATE CAUSE. OJI-CV Chapter 405.

14. DAMAGES. OJI-CV Chapter 315.

CV 411.57 Public safety vehicles—duty of others R.C. 4511.452 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, negligently failed (to yield the right of way) (stop clear of an intersection) upon the approach of a public safety vehicle which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle upon the approach of a public safety vehicle that was using (flashing) (rotating) (oscillating) light and sounding a (siren) (exhaust whistle) (bell), negligently failed to

(*Use appropriate alternative*)

(1) yield the right of way, immediately drive to a position to and as close as possible to the right (edge) (curb) of the highway, clear of any intersection, stop

and remain stopped until the public safety vehicle passed; and

(*or*)

(2) immediately stop clear of any intersection and remain stopped until the public safety vehicle passed; and

(B) this failure proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. PUBLIC SAFETY VEHICLE. R.C. 4511.01.

5. FAILURE TO HEAR OR SEE. The driver of another vehicle is not negligent in failing to heed the audible sound or warning lights on (an emergency vehicle) (a public safety vehicle) unless it is established by the greater weight of the evidence that he/she heard the audible sound or saw the warning lights, or that he/she should, in the exercise of ordinary care, have heard or seen them.

COMMENT

Drawn from *Parton v. Weilnau*,169 Ohio St. 145 (1959); *Corrigan v. Aero Mayflower Transit Co.*, 91 Ohio Law Abs. 26, (App. 1963).

6. FOLLOWING PUBLIC SAFETY VEHICLE PROHIBITED. R.C. 4511.72.

7. RIGHT OF WAY. "Right of way" means the right of a vehicle to proceed uninterruptedly in a lawful manner in the direction in which it/he/she is moving in preference to another vehicle approaching from a different direction into its/his/her path.

COMMENT

R.C. 4511.01.

8. IN A LAWFUL MANNER. To keep his/her right of way as a preferred party to continue to travel uninterruptedly, the driver must operate his/her vehicle in a lawful manner. If he/she does not do so, he/she loses the right of way and his/her status as the preferred party.

COMMENT

The preferred party has an absolute right of way unless he violates a *statute*. He cannot lose his right of way by failure to use ordinary care, and such instruction to a jury is error. *Deming v. Osinski*, 24 Ohio St.2d 179 (1970).

9. LOSS OF RIGHT OF WAY. If a preferred party loses the right of way by not proceeding in a lawful manner, each party then must use ordinary care under the circumstances.

10. NEGLIGENCE. If you find by the greater weight of the evidence that the defendant failed to (immediately yield the right of way) (immediately stop clear of any intersection), the defendant is negligent.

COMMENT

The Committee believes that a violation of this section is a violation of a rule of law. The above instruction that its violation is negligence has therefore been added. *See* OJI-CV 411.01 §§ 4, 5, and 6.

This instruction does not apply if traffic is otherwise directed by a police officer.

It is not recommended that instructions include the type or visibility of the equipment unless it actually becomes an issue in a particular case.

11. DUTY OF PUBLIC SAFETY VEHICLE. The driver of a public safety vehicle with the right of way over other traffic must drive with ordinary (care) (caution) for the safety of all other persons and property upon the highway.

COMMENT

Drawn from *Parton v. Weilnau*, 169 Ohio St. 145 (1959); *Corrigan v. Aero Mayflower Transit Co.*, 91 Ohio Law Abs. 26, (App. 1963).

12. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

13. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

14. CONCLUSION. OJI-CV Chapter 313.

15. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

16. PROXIMATE CAUSE. OJI-CV Chapter 405.

17. DAMAGES. OJI-CV Chapter 315.

CV 411.59 Right of way when entering highway from other than roadway R.C. 4511.44 *[Rev. 12/6/14]*

1. GENERAL. The plaintiff claims that the defendant, while (entering) (crossing) a (street) (highway) (roadway), negligently failed to yield the right of way which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the defendant, while operating a vehicle,

(A) (entered) (crossed) a (street) (highway) (roadway) from other than another roadway; and

(B) failed to yield the right of way to the plaintiff approaching on the roadway; and

(C) this failure proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. STREET. R.C. 4511.01.

5. HIGHWAY. R.C. 4511.01.

6. ROADWAY. R.C. 4511.01.

7. RIGHT OF WAY. "Right of way" means the right of a driver of a vehicle to proceed without interruption in a lawful manner in the direction in which he/she is moving in preference to another vehicle approaching from a different direction into his/her path.

COMMENT

Drawn from R.C. 4511.01.

8. APPROACHING. "Approaching" means that a vehicle is so close in distance and time that a (collision) (some delay or interference) will occur if the driver who does not have the right of way does not (stop) (reduce his/her speed) (*describe other action*) and yield the right of way to the plaintiff.

9. LOSS OF RIGHT OF WAY (ADDITIONAL). If you find that the plaintiff was not (traveling) (walking) in a lawful manner, then he/she (did not have) (lost) the right of way and was not entitled to any preference over the defendant. In that event, the defendant was not required to yield the right of way and the parties have equal rights and each must use ordinary care under the circumstances. If you find that the plaintiff was (traveling) (walking) in a lawful manner, then he/she (had) (did not lose) the right of way and the defendant was required to yield the right of way to him/her.

COMMENT

A driver with the right of way has an absolute right of way unless the driver violates Ohio traffic laws. A driver need not look for pedestrians or vehicles violating the driver's right of way. However, upon discovering a dangerous or perilous situation, the driver of a vehicle must exercise due care to avoid colliding with a pedestrian or vehicle in the driver's right of way. *See Deming v. Osinski*, 24 Ohio St.2d 179 (1970).

10. NEGLIGENCE. If you find by the greater weight of the evidence that the defendant failed to yield the right of way to the plaintiff, the defendant is negligent.

11. NEGLIGENCE AND ORDINARY CARE (ADDITIONAL). OJI-CV Chapter 401.

COMMENT

This instruction should be given only in conjunction with a loss of right of way instruction.

12. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

13. CONCLUSION. OJI-CV Chapter 313.

14. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

15. PROXIMATE CAUSE. OJI-CV Chapter 405.

16. DAMAGES. OJI-CV Chapter 315.

CV 411.61 Right of way of pedestrian R.C. 4511.46 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, failed to yield the right of way to the plaintiff while the plaintiff was crossing the roadway within a crosswalk which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff you must find by a greater weight of the evidence that

(A) the defendant was operating a vehicle;

(B) the defendant failed to yield the right of way to the plaintiff, who was lawfully crossing a roadway in the crosswalk; and

(C) this failure proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. LAWFUL RIGHT OF WAY IN CROSSWALK. When traffic signals are not (present) (operating), the driver of a vehicle must (yield the right of way) (slow down or stop if need be to yield the right of way) to a pedestrian crossing the roadway within a crosswalk when the pedestrian is (in that [half] [portion] [lane] of the roadway in which the vehicle is traveling) (approaching so closely from the opposite [half] [portion] [lane] of the roadway in which the vehicle is traveling that the pedestrian is in danger).

COMMENT

See *Fritz v. McCabe* (1982), 7 Ohio App.3d 328, which applies to both pedestrian and driver. This instruction does not apply where there are pedestrian tunnels or overhead pedestrian crossing. R.C. 4511.48(B).

5. ROADWAY. R.C. 4511.01.

6. CROSSWALK. R.C. 4511.01.

7. TRAFFIC CONTROL SIGNALS. R.C. 4511.01.

8. SUDDENLY LEAVING CURB. A pedestrian must not suddenly leave a (curb) (*describe place of safety*) and (walk) (run) into the path of a vehicle that is so close that it (constitutes) (is) an immediate hazard.

COMMENT

Drawn from R.C. 4511.46(B).

9. IMMEDIATE HAZARD (OPTIONAL). An immediate hazard is present when an approaching vehicle is so close in distance and time that a collision will occur or a dangerous situation will be created if the (driver) (pedestrian) who does not have the right of way fails to yield that right of way.

10. PASSING PROHIBITED. If a vehicle is stopped at a (marked crosswalk) (unmarked crosswalk at an intersection) to permit a pedestrian to cross a roadway, the driver of any other vehicle approaching from the rear must not overtake and pass the stopped vehicle.

COMMENT

R.C. 4511.46(D).

11. NOT IN CROSSWALK. A pedestrian crossing a roadway at any point other than within (a marked crosswalk) (an unmarked crosswalk at an intersection) must yield the right of way to all vehicles on the roadway.

COMMENT

R.C. 4511.48(A).

12. CROSSING INTERSECTIONS DIAGONALLY. A pedestrian must not cross a roadway intersection diagonally unless authorized by a traffic control device and then only in accordance with the signal.

COMMENT

R.C. 4511.48(D).

13. INTOXICATED PEDESTRIAN. A pedestrian must not (walk) (be) on a highway if he/she is under the influence of (alcohol) (a drug of abuse) (a combination of alcohol and a drug of abuse) to a degree that (renders) (makes) him/her a hazard.

COMMENT

R.C. 4511.481.

14. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

15. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

16. CONCLUSION. OJI-CV Chapter 313.

17. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

18. PROXIMATE CAUSE. OJI-CV Chapter 405.

19. DAMAGES. OJI-CV Chapter 315.

CV 411.63 Blind persons R.C. 4511.47 *[Rev. 12/7/14]*

1. GENERAL. The plaintiff claims that the defendant, while operating a vehicle, negligently failed to yield the right of way to the plaintiff which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant was operating a vehicle and approaching the plaintiff(s);

(B) the defendant failed to yield the right of way to the plaintiff;

(C) the plaintiff was a blind person (guided by a dog) (carrying a cane which is predominately white or metallic in color with or without a white tip); and

(D) this failure proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. RIGHT OF WAY. "Right of way" means the right of a pedestrian to proceed uninterruptedly in a lawful manner in the direction he/she is moving in preference to another vehicle approaching into his/her path.

5. IN A LAWFUL MANNER. To keep his/her right of way as a preferred party to continue to travel uninterruptedly, the driver must operate his/her vehicle in a lawful

manner. If he/she does not do so, he/she loses the right of way and his/her status as the preferred party.

COMMENT

The preferred party has an absolute right of way unless he violates a *statute*. The preferred party cannot lose his/her right of way by failure to use ordinary care, and such instruction to a jury is error. *Deming v. Osinski*, 24 Ohio St.2d 179 (1970).

6. LOSS OF RIGHT OF WAY. If a preferred party loses the right of way by not proceeding in a lawful manner, each party then must use ordinary care under the circumstances.

7. NEGLIGENCE. If you find by the greater weight of the evidence that the defendant failed to yield the lawful right of way to the plaintiff, a blind person, the defendant is negligent.

8. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

9. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

10. CONCLUSION. OJI-CV Chapter 313.

11. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

12. PROXIMATE CAUSE. OJI-CV Chapter 405.

13. DAMAGES. OJI-CV Chapter 315.

CV 411.65 Traveling on outside of vehicle R.C. 4511.51 *[Rev. 12/6/14]*

COMMENT

R.C. 4511.51 does not apply to test mechanics or test engineers making repairs or adjustments or to workers performing specialized highway or street maintenance or construction under authority of a public agency.

1. GENERAL. The plaintiff claims the defendant, while operating a vehicle, knowingly permitted the plaintiff to (hang) (ride) on the outside of a vehicle operated by the defendant which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a vehicle on a roadway, knowingly permitted the plaintiff(s) to (hang) (ride) on the outside of the vehicle; and

(B) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. ROADWAY. R.C. 4511.01.

5. NEGLIGENCE. If you find by the greater weight of the evidence that the defendant knowingly permitted the plaintiff to (hang) (ride) on the outside of defendant's vehicle while it was moving on a roadway, you must find the defendant negligent.

6. KNOWINGLY. OJI-CR 417.11; R.C. 2901.22(B).

7. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

8. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

9. CONCLUSION. OJI-CV Chapter 313.

10. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

11. PROXIMATE CAUSE. OJI-CV Chapter 405.

12. DAMAGES. OJI-CV Chapter 315.

CV 411.67 Parking on highways R.C. 4511.66 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant (stopped) (parked) (left standing) a vehicle on a highway which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant (stopped) (parked) (left standing) a vehicle, whether attended or unattended, on the (paved) (main traveled) part of any highway outside a (business) (residential) district when the defendant could have (stopped) (parked) (left standing) such vehicle off the highway;

(B) there was not a clear and unobstructed portion of the highway opposite the defendant's vehicle left for the free passage of the plaintiff's vehicle;

(C) there was not a clear view of the stopped vehicle from a distance of two hundred feet in each direction on the highway; and

(D) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. PARKING PROHIBITIONS.

COMMENT

See R.C. 4511.68 for additional parking prohibitions.

5. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

6. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

7. CONCLUSION. OJI-CV Chapter 313.

8. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

CV 411.69 Unsafe vehicle R.C. 4513.02 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims the defendant, while operating a vehicle that was in an unsafe condition, proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant operated or knowingly permitted to be driven a vehicle that was driven or moved on a highway;

(B) the vehicle was in an unsafe condition as to endanger the plaintiff; and

(C) this negligence proximately caused (injury) (damage) to the plaintiff.

3. VEHICLE. R.C. 4511.01.

4. OPERATED. R.C. 4511.01.

5. KNOWINGLY. OJI-CR 417.11; R.C.2901.22(B).

6. UNSAFE CONDITION. R.C. 4513.021.

7. BUMPERS. A driver must not operate upon any street or highway a vehicle that

(*Use appropriate alternative*)

(A) was originally equipped with bumpers as standard equipment, unless the vehicle is equipped with substitute bumpers equal to the original equipment when so operated.

(*or*)

(B) has a suspension system or body so modified that the height of any bumper on the vehicle varies more than three inches from the original manufactured bumper height for the vehicle.

8. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

9. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

10. CONCLUSION. OJI-CV Chapter 313.

11. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

12. PROXIMATE CAUSE. OJI-CV Chapter 405.

13. DAMAGES. OJI-CV Chapter 315.

CV 411.71 Failure to display lights or illuminating devices R.C. 4513.03 ***[Rev. 12/6/14]***

1. GENERAL. The plaintiff claims that the defendant, while operating a (vehicle)

(*specify other vehicle as defined in R.C. 4511.01*), failed to properly use (lighted lights) (illuminating devices) which proximately caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while operating a (vehicle) (*describe other vehicle defined in R.C. 4511.01*), failed to (use) (display) (*specify applicable lighted lights or illuminated device set forth in R.C. 4513.04 to 4513.37*);

(B)

(*Use appropriate alternative*)

(1) from sunset to sunrise;

(*or*)

(2) when due to insufficient natural light or unfavorable atmospheric conditions, persons, vehicles, and substantial objects on the highway are not discernible at a distance of one thousand feet ahead;

(*or*)

(3) when the windshield wipers of the vehicle are in use because of precipitation on the windshield;

(*or*)

(4) when (*insert appropriate requirement contained in R.C. 4513.05–4513.19*).

COMMENT

R.C. 4513.03.

(C) which proximately caused (injury) (damage) to the plaintiff.

3. OPERATED. R.C. 4511.01.

4. NEGLIGENCE. If you find by the greater weight of the evidence that the defendant failed to (use) (display) his/her (lighted lights) (illuminating devices), this is negligence.

COMMENT

A violation of R.C. 4513.03 is negligence per se, *Roszman v. Sammett*, 26 Ohio St.2d 94 (1971), *reversed on other grounds*, *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711.

5. NEGLIGENCE AND ORDINARY CARE. OJI-CV Chapter 401.

6. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

7. CONCLUSION. OJI-CV Chapter 313.

8. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV 411.73.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

CV 411.73 Automobile affirmative defenses *[Rev. 12/6/14]*

COMMENT

The trial judge must determine which, if any, of the following affirmative defenses apply.

1. AFFIRMATIVE DEFENSE (ADDITIONAL). The defendant claims (*describe affirmative defense*). This is an affirmative defense. The burden of proving an affirmative defense by a preponderance of the evidence is on the defendant.

2. ACT OF GOD. OJI-CV 401.25.

3. SUDDEN EMERGENCY—LEGAL EXCUSE.

(A) GENERAL. The defendant claims that although he/she violated a statute (in crossing to the left of the center line), this action was not negligence because he/she was faced with a sudden emergency.

(B) ISSUE OF SUDDEN EMERGENCY. An operator of a vehicle who (fails to comply with a safety statute) (crosses to the left of the center line) is excused from such failure to comply with the statute, and he/she avoids the legal effect of negligence arising therefrom, by establishing by the greater weight of the evidence that, without fault on his/her part and because of circumstances over which he/she had no control, he/she was confronted by a sudden and unforeseeable emergency which made compliance with such statute impossible. If you find that these conditions existed, the defendant is excused from a violation of such statute.

COMMENT

Drawn from *Satterthwaite v. Morgan*, 141 Ohio St. 447 (1943). *See Childers v. Uhrig*, 23 Ohio Misc. 172 (1970).

(C) DUTY IN SUDDEN EMERGENCY. If you find that the defendant was excused from complying with the statute because of a sudden emergency, he/she is still required to use ordinary care under the circumstances. Ordinary care is such care as a reasonably (cautious) (careful) (prudent) person would use under the same or similar circumstances. You will consider the (danger) (confusion) (excitement) of

the situation, and, along with the other facts, you will decide whether the defendant used ordinary care.

COMMENT

Childers v. Uhrig, 23 Ohio Misc. 172 (1970).

4. BLACKOUT.

(A) GENERAL. The defendant claims he/she is excused for his/her negligence because he/she was stricken by a (loss of consciousness) (fainting spell) (heart attack) (blackout) that he/she could not reasonably foresee and that rendered it impossible for him/her to control the car he/she was operating.

(B) PROOF. In order to establish this defense, the defendant must prove by the greater weight of the evidence all of the following:

(1) the defendant was suddenly stricken by a (loss of consciousness) (heart attack) (fainting spell) (blackout);

(2) that in the exercise of ordinary care he/she could not foresee; and

(3) which rendered control of the motor vehicle impossible.

(C) FORESEEABILITY. To decide whether the defendant had reasonable cause to foresee the possibility of sudden (state condition), you may consider whether the evidence discloses that the defendant had previous experiences which would have warned a reasonably (cautious) (careful) (prudent) person in the position of the defendant of a (tendency to) (likelihood of) such condition attacks, and thus make it dangerous for him/her to drive a motor vehicle, or require him/her in the use of ordinary care to take additional precautions.

5. TIRE OR MECHANICAL FAILURE.

(A) GENERAL. The defendant claims he/she is excused for being negligent by the reason of (tire failure) (mechanical failure) (*describe other failure*).

(B) PROOF. In order to establish this defense, the defendant must prove by the greater weight of the evidence all of the following:

(1) the (tire failure) (mechanical failure) (*describe other failure*) was not due to the fault of the defendant;

(2) the failure occurred under circumstances over which he/she had no control; and

(3) the failure resulted in a sudden emergency that was not of his/her own making and that made compliance with the law impossible.

(C) DRIVER NOT EXCUSED. The driver of a vehicle is not excused and is negligent if he/she knew, or in the use of ordinary care should have known, of (a

poor condition of the tire) (faulty mechanical condition) (*describe other condition*) prior to the accident, and if he/she should have foreseen that it was dangerous for him/her to operate the vehicle in such condition or that he/she should have taken additional precautions under the circumstances.

COMMENT

Failure of any braking system constitutes negligence as a matter of law. *Stump v. Phillians*, 2 Ohio St.2d 209 (1965). It appears that this rule includes all failure of equipment where there is a statutory duty to maintain the same. Tire failure is not an excuse for noncompliance with the assured clear distance ahead statute. *Moore v. Siebelt*, 6 Ohio St.2d 115 (1966).

The use of the above instruction is considerably restricted by the decisions where a specific mechanical standard of the statutes is violated.

In addition, R.C. 4513.02 prohibits the use of any vehicle that is in such unsafe condition as to endanger any person.

(D) FORESEEABILITY. OJI-CV 401.07

6. PREPONDERANCE. OJI-CV 303.05

7. CONCLUSION WITH AFFIRMATIVE DEFENSE.

(A) If you find the defendant has proven (*insert affirmative defense*) by the greater weight of the evidence, you must find for the defendant.

(B) If you find that the defendant did not prove his/her affirmative defense, you must find for the plaintiff if the plaintiff proved his/her claim by the greater weight of the evidence.

CV 411.75 Liability of owner of vehicle (negligent entrustment) *[Rev. 4/28/18]*

COMMENT

For tort claims, the general instructions regarding torts must be given to the jury. *See* OJI-CV Title 4.

Negligent entrustment can include the original entrustment and a downstream entrustment by the original entrustee. If the original entrustment is not negligent, there is no claim for relief against the owner of the vehicle for a downstream entrustment. *Hicks v. State Farm Mut. Auto. Ins. Co.*, 2d Dist. Montgomery No. 27103, 2017-Ohio-7095. If the claim for relief is based solely on the original entrustment, use proof of claim number 2 below. If there is a claim for downstream entrustment, use proof of claim number 3 below.

1. GENERAL. The plaintiff claims that the defendant is liable for the negligence of (*insert name of operator of vehicle*) under a theory of negligent entrustment.

2. PROOF OF CLAIM. Before you can find for the plaintiff on a theory of negligent entrustment, you must find by the greater weight of the evidence that

(A) the defendant was the owner of the vehicle; and

(B) (*insert name of operator of the vehicle*) operated the vehicle with the permission and authority of the defendant; and

(C) (*insert name of operator of the vehicle*) was an incompetent driver because (*describe the condition(s) of incompetence);* and

(D) the defendant knew or should have known that (*insert name of operator of the vehicle*) was incompetent when the vehicle was entrusted to him/her for the reasons described above.

COMMENT

Williamson v. Eclipse Motor Lines, Inc., 145 Ohio St. 467 (1945); *Hicks v. State Farm Mut. Auto. Ins. Co.*, 2d Dist. Montgomery No. 27103, 2017-Ohio-7095.

3. PROOF OF CLAIM—DOWNSTREAM ENTRUSTMENT. The owner of the vehicle may be liable for the negligent actions of an entrustee of the original entrustee if it can be shown that the original entrustment was negligent. The plaintiff claims that the defendant negligently entrusted his/her/its vehicle to (*insert name of original entrustee*), who, in turn, entrusted the vehicle to (*insert name of operator of vehicle*). Before you can find for the plaintiff on a theory of negligent entrustment, you must find by the greater weight of the evidence that

(A) the defendant was the owner of the vehicle; and

(B) (*insert name of operator of the vehicle*) operated the vehicle with the permission and authority of (*insert name of original entrustee*); and

(C) (*insert name of original entrustee*) was an incompetent driver because (*describe the condition of incompetence*); and

(D) the defendant knew or should have known that (*insert name of original entrustee*) was incompetent when the vehicle was entrusted to him/her for the reasons described above.

COMMENT

Drawn from *Hicks v. State Farm Mut. Auto. Ins. Co.*, 2d Dist. Montgomery No. 27103, 2017-Ohio-7095.

4. NEGLIGENCE. OJI-CV 401.01.

5. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

6. CONCLUSION. OJI-CV Chapter 313.

7. PROXIMATE CAUSE. OJI-CV 405.01.

8. DAMAGES. OJI-CV Chapter 315.

CV 411.77 Liability of owner present in vehicle but not the operator *[Rev. 4/28/18]*

COMMENT

For tort claims, the general instructions regarding torts must be given to the jury. *See* OJI-CV Title 4.

Where the owner of a motor vehicle being driven by another is an occupant, a rebuttable presumption or inference arises that the owner has control over it and that the driver is acting as his or her agent in operating the vehicle. *Ross v. Burgan*, 163 Ohio St. 211 (1955).

1. GENERAL. The plaintiff claims that the defendant is liable for the negligence of (*insert name of operator of vehicle*) because he/she was the owner of the vehicle and a passenger in the vehicle at the time of the negligence of (*insert name of operator of vehicle*). When the owner is present and riding as a passenger in his/her vehicle, there is an inference that the owner had the control and direction of the vehicle and the driver was acting on behalf of the owner in the operation of the vehicle.

COMMENT

Drawn from *Ross v. Burgan*, 163 Ohio St. 211 (1955). For further discussion of agency, see OJI-CV Chapter 423.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant was the owner of the vehicle; and

(B) the defendant was a passenger in the vehicle at the time of the negligence of (*insert name of operator of vehicle*); and

(C) the inference that the driver was acting on behalf of the owner is not overcome.

3. INFERENCE. "Inference," under these circumstances, means that since the owner was present in the vehicle, you may find that the driver was acting on behalf of the owner unless you find by the greater weight of the evidence that the owner of the vehicle did not have the right to direct and control the driver in the operation of the vehicle.

4. CONTROL. "Control" means that the owner need not exercise control of the

vehicle; the owner need only have the right to do so.

5. NEGLIGENCE. OJI-CV 401.01.

6. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.

7. CONCLUSION. OJI-CV Chapter 313.

8. PROXIMATE CAUSE. OJI-CV 405.01.

9. DAMAGES. OJI-CV Chapter 315.

CV 411.79 Liability of parent/guardian/other responsible person *[Rev. 4/28/18]*

1. GENERAL. The plaintiff claims that the defendant is liable for the negligence of *(insert name of minor driver)*. Any negligence, or willful or wanton misconduct, that is committed by a minor under eighteen years of age when driving a motor vehicle upon a highway shall be attributed to the person who has signed the application of the minor for a probationary license, restricted license, or temporary instruction permit.

COMMENT

Drawn from R.C. 4507.07 (B).

The liability for the person signing for the license is joint and several with the minor. This joint and several liability is not subject to R.C. 2307.22 or R.C. 2315.36. There is no imputed liability under R.C. 4507.07 if the minor has proof of financial responsibility with respect to the operation of a motor vehicle owned by the minor or, if the minor is not the owner of the motor vehicle, with respect to the minor's operation of any motor vehicle, in the form and in the amounts required under R.C. Chapter 4509.

R.C. 4507.07 imposes strict liability on a person who signs a minor's application for a temporary or probationary license absent proof of financial responsibility. *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490 (10th Dist.).

2. PROOF OF CLAIM. Before you may find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant signed the application of *(insert name of minor driver)* for a probationary license, restricted license, or temporary permit; and

(B) *(insert name of minor driver)* committed (negligence) (an act of willful or wanton misconduct) while operating a motor vehicle on a highway; and

(C) *(insert name of minor driver)* was a minor under the age of eighteen at the time; and

(D) this (negligence) (act of willful or wanton misconduct) proximately caused (injury) (damage) to the plaintiff.

3. MOTOR VEHICLE. R.C. 4511.01.

4. NEGLIGENCE. OJI-CV Chapter 401.
5. AUTOMOBILE AFFIRMATIVE DEFENSES. OJI-CV 411.73.
6. CONCLUSION. OJI-CV Chapter 313.
7. PROXIMATE CAUSE. OJI-CV Chapter 405.
8. DAMAGES. OJI-CV Chapter 315.

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Chapter CV 413

INTOXICANTS

CV 413.01 Introduction *[Rev. 12/10/16]*

CV 413.03 On-premises liability of permit holder or employee R.C. 4399.18 *[Rev. 12/10/16]*

CV 413.05 Off-premises liability of permit holder or employee R.C. 4399.18 *[Rev. 12/10/16]*

CV 413.07 Liability Under Civil Damages Act R.C. 4399.01 *[Rev. 12/10/16]*

CV 413.09 Liability of social provider to third person *[Rev. 12/10/16]*

CV 413.11 Damages *[Rev. 12/10/16]*

CV 413.13 Liability of social provider to a minor *[Rev. 12/10/16]*

CV 413.01 Introduction *[Rev. 12/10/16]*

1. INTRODUCTION. The law allows a person injured by an intoxicated person to recover damages from the provider of alcoholic beverages to that intoxicated person under certain circumstances.

COMMENT

The Ohio Dram Shop Act, R.C. 4399.18, provides the sole means for imposing liability on a liquor permit holder when a third party suffered injuries caused by the permit holder's intoxicated patron. *Klever v. Canton Sachsenheim, Inc.*, 86 Ohio St.3d 419 (1999); *Johnson v. Montgomery*, 2d Dist. Montgomery No. 26319 and 26322, 2016-Ohio-1472.

The Civil Damages Act, R.C. 4399.01, previously set forth in OJI-CV 413.07, was repealed 7/23/2004.

CV 413.03 On-premises liability of permit holder or employee R.C. 4399.18 *[Rev. 12/10/16]*

1. GENERAL. The plaintiff claims that (*insert name of liquor permit holder and/or name of employee[s] of liquor permit holder*)'s act of selling intoxicating liquor or beer to the intoxicated person caused (injury) (death) (property damage) to the plaintiff.

2. PROOF OF CLAIM. Before you may find for the plaintiff, you must find by the greater weight of the evidence all of the following:

(A) the plaintiff suffered (injury) (death) (property damage) that was caused by the intoxicated person;

(B) the (injury) (death) (property damage) occurred (on the permit holder's licensed

premises) (in a parking lot under the permit holder's control);

(C) the (defendant) (defendant's employee[s]) sold intoxicating liquor or beer to the intoxicated person; and

(D) the plaintiff's (injury) (death) (property damage) was (proximately) (directly) caused by the negligence of the (defendant) (defendant's employee[s]) in selling intoxicating liquor or beer to the intoxicated person and that the intoxicated person's conduct causing the plaintiff's (injury) (death) (property damage) resulted from his/her intoxication.

COMMENT

A violation of R.C. 4301.22(B) constitutes negligence per se. *Mason v. Roberts*, 33 Ohio St.2d 29 (1973).

Although the plaintiff must establish that the person who actually caused the injury, death, or property damage was negligent, the plaintiff must also establish that the intoxication of the person was a proximate cause of the injury, death, or property damage to recover against a permit holder or his/her/its employee. Establishing a lapse of due care by the intoxicated person is not sufficient. It must be established that the person's intoxication caused the lapse of due care. *Osler v. Lorain*, 28 Ohio St.3d 345 (1986).

3. SELLING. "Selling" includes any exchange, barter, gift, offer for sale, sale, distribution, and delivery of any kind.

COMMENT

Drawn from R.C. 4301.01.

4. INTOXICATING LIQUOR. R.C. 4301.01.

5. BEER. "Beer" includes all beverages brewed or fermented wholly or in part from malt products and containing one-half of one per cent or more of alcohol by volume.

COMMENT

R.C. 4301.01.

6. NEGLIGENCE. OJI-CV Chapter 401.

COMMENT

The Committee believes that negligence under this statute may include

intentional or reckless acts of the intoxicated person. *Campbell v. Chris's Café, Inc.*, 2d Dist. Montgomery No. 05-CA-108, 2006-Ohio-4063; *McKinley v. Chris' Band Box*, 153 Ohio App.3d 387, 2003-Ohio-4086 (2d Dist.). The standard negligence and proof of claim instructions should be tailored accordingly if the evidence shows such intentional or reckless acts.

7. CONCLUSION. OJI-CV Chapter 313.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. DAMAGES. OJI-CV Chapter 315.

CV 413.05 Off-premises liability of permit holder or employee R.C. 4399.18 *[Rev. 12/10/16]*

1. GENERAL. The plaintiff claims that (*insert name of liquor permit holder and/or name of employee[s] of liquor permit holder*)'s act of selling intoxicating liquor or beer to the intoxicated person caused (injury) (death) (property damage) to the plaintiff.

2. PROOF OF CLAIM. Before you may find for the plaintiff, you must find by the greater weight of the evidence all of the following:

(A) the plaintiff suffered (injury) (death) (property damage) that was caused by the negligent act(s) of the intoxicated person;

(B) the (defendant) (defendant's employee[s]) knowingly sold intoxicating liquor or beer to the intoxicated person who was (noticeably intoxicated) (under the age of twenty-one years); and

(C) the intoxicated person's intoxication (proximately) (directly) caused the plaintiff's (injury) (death) (property damage).

COMMENT

R.C. 4399.18(A) and (B).

Ordinary negligence of the defendant or the defendant's employee(s) is not at issue in this claim because the sale by defendant or defendant's employee(s), if shown to be to a noticeably intoxicated person or one under the age of twenty-one years, constitutes negligence per se.

When considering the term "knowingly" contained in section (B), a jury can use circumstantial evidence find that a liquor permit holder knowingly sold an intoxicating beverage to a noticeably intoxicated person or one under the age of twenty-one. The term has been further construed to mean the knowledge of an existing condition that is imputed from a personal relationship to the condition where one's association with it, their control over it, or their direction of it are such to give them actual personal information concerning it. *Gressman v. McClain*, 40 Ohio St.3d 359 (1988); *Studer v. VFW Post 3767*, 185 Ohio App.3d 691 (11th Dist.2009).

When considering sale to a noticeably intoxicated person, actual knowledge is required. Mere constructive knowledge is insufficient. *Gressman v. McClain*, 40 Ohio St.3d 359 (1988); *Studer v. VFW Post 3767*, 185 Ohio App.3d 691 (11th Dist.2009).

When considering sale to a person under the age of twenty-one years, "knowingly" is interpreted more broadly, as meaning knowing or having reason to know. *Lesnau v. Andate Enters*, 93 Ohio St.3d 467 (2001). Nevertheless, strict liability is not imposed on the defendant or the defendant's employee(s) who serve(s) an underage person because of the knowledge requirement. *Campbell v. Chris's Café, Inc.*, 2d Dist. Montgomery No. 05-CA-108, 2006-Ohio-4063.

Although the plaintiff must establish that the person who actually caused the injury, death, or property damage was negligent, the plaintiff must also establish that the intoxication of the person was a proximate cause of the injury, death, or property damage to recover against a permit holder or his/her/its employee. Establishing a lapse of due care by the intoxicated person is not sufficient. It must be established that the person's intoxication caused the lapse of due care. *Osler v. Lorain*, 28 Ohio St.3d 345 (1986).

3. SELLING. "Selling" includes any exchange, barter, gift, offer for sale, sale, distribution, and delivery of any kind.

COMMENT

Drawn from R.C. 4301.01.

4. INTOXICATING LIQUOR. R.C. 4301.01.

5. BEER. "Beer" includes all beverages brewed or fermented wholly or in part from malt products and containing one-half of one per cent or more of alcohol by volume.

COMMENT

R.C. 4301.01.

6. NEGLIGENCE. OJI-CV Chapter 401.

COMMENT

The Committee believes that negligence under this statute may include intentional or reckless acts of the intoxicated person. *Campbell v. Chris's Café, Inc.*, 2d Dist. Montgomery No. 05-CA-108, 2006-Ohio-4063; *McKinley v. Chris' Band Box*, 153 Ohio App.3d 387, 2003-Ohio-4086 (2d Dist.). The standard negligence and proof of claim instructions should be tailored accordingly if the

evidence shows such intentional or reckless acts.

7. CONCLUSION. OJI-CV Chapter 313.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. DAMAGES. OJI-CV Chapter 315.

CV 413.07 Liability Under Civil Damages Act R.C. 4399.01 *[Rev. 12/10/16]*

COMMENT

The Civil Damages Act, R.C. 4399.01, previously set forth in OJI-CV 413.07, was repealed 7/23/04.

CV 413.09 Liability of social provider to third person *[Rev. 12/10/16]*

1. GENERAL. A social (provider) (host) who provides intoxicating liquor or beer to an underage person, or knowingly allows any underage person to remain in or on the (premises) (property) of the social (provider) (host) while the underage person is possessing or consuming intoxicating liquor or beer may be held liable for injuries to a third person injured by the negligent acts caused by the intoxication of the underage person.

COMMENT

Drawn from R.C. 4301.69.

2. PROOF OF CLAIM. Before you may find for the plaintiff, you must find by the greater weight of the evidence that

(A) the social (provider) (host) provided the intoxicating liquor or beer to the underage person, or the social (provider) (host) possessed actual knowledge that underage alcohol consumption or possession was occurring on the social (provider's) (host's) premises; and

(B) the intoxication of the underage person (proximately) (directly) caused the plaintiff's (injury) (death) (property damage).

COMMENT

Drawn from R.C. 4301.69.

A social provider or host may be liable to third parties injured by the negligent acts caused by the intoxication of the consumer if the social provider or host violated a specific statutory duty in providing alcoholic beverages to a minor in

violation of R.C. 4301.69. *Mitseff v. Wheeler*, 38 Ohio St.3d 112 (1988). Violating R.C. 4301.69(B) constitutes negligence per se and establishes the duty and breach elements of a negligence action; however, it is not a strict liability statute. *Huston v. Konieczny*, 52 Ohio St.3d 214 (1990); *Wesley v. Walraven*, 4th Dist. Washington No. 12CA18, 2013-Ohio-473.

A social provider or host is not liable to an "adult" who is underage, as defined in R.C. 4301.69, where the cause of the adult's injury or death is his/her own voluntary intoxication. *Klever v. Canton Sachsenheim, Inc.*, 86 Ohio St.3d 419 (1999); *Kirchner v. Shooters on the Water, Inc.*, 167 Ohio App.3d 708, 2006-Ohio-3583 (8th Dist.).

Although the plaintiff must establish that the person who actually caused his/her injury, death, or property damage was negligent, the plaintiff must also establish that the intoxication of the person was a proximate cause of the plaintiff's injury, death, or property damage to recover against a social provider or host. Establishing a lapse of due care by the intoxicated person is not sufficient. It must be established that the person's intoxication caused the lapse of due care. Although not the holding, see generally *Osler v. Lorain*, 28 Ohio St.3d 345 (1986).

3. UNDERAGE PERSON. "Underage person" means a person under the age of twenty-one.

COMMENT

R.C. 4301.69.

4. SOCIAL PROVIDER OR HOST. A "social provider" or "social host" means a person who receives guests by express or implied invitation to unlicensed premises, and for purposes of hospitality, (provides) (permits the consumption of) intoxicating liquor or beer to/by such guests.

COMMENT

Drawn from N.J. Stat. § 2A:15-5.5. *Hardester v. City of Long Branch*, D.N.J. No. 07-3454 (Feb. 22, 2013). The Ohio Liquor Control Law, R.C. 4301, does not define "social provider" or "social host."

5. INTOXICATING LIQUOR. R.C. 4301.01.

6. BEER. "Beer" includes all beverages brewed or fermented wholly or in part from malt products and containing one-half of one per cent or more of alcohol by volume.

COMMENT

R.C. 4301.01.

7. AFFIRMATIVE DEFENSE:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) PARENT, SPOUSE, LEGAL GUARDIAN. The defendant claims that, despite being a social (provider) (host) that possessed actual knowledge that the underage person was consuming or possessing intoxicating liquor or beer on the social (provider's) (host's) premises, he/she/it is excused if

(1) the intoxicating liquor or beer was given to the person possessing or consuming it by that person's parent, spouse who is not an underage person, or legal guardian; and

(2) the parent, spouse who is not an underage person, or legal guardian was present at the time of the underage person's possession or consumption of the intoxicating liquor or beer.

COMMENT

Drawn from R.C. 4301.69(B).

The Committee recognizes that there may be a statutory inconsistency regarding the age requirement of a parent, spouse, and legal guardian.

If the intoxicating liquor or beer is provided by a physician in the regular line of his/her practice or given for established religious purposes, see R.C. 4301.69(A).

8. NEGLIGENCE. OJI-CV Chapter 401.

COMMENT

The Committee believes that negligence under this statute may include intentional or reckless acts of the intoxicated person. *Campbell v. Chris's Café, Inc.*, 2d Dist. Montgomery No. 05-CA-108, 2006-Ohio-4063; *McKinley v. Chris' Band Box*, 153 Ohio App.3d 387, 2003-Ohio-4086 (2d Dist.). The standard negligence and proof of claim instructions should be tailored accordingly if the evidence shows such intentional or reckless acts.

9. CONCLUSION. OJI-CV Chapter 313.

10. PROXIMATE CAUSE. OJI-CV Chapter 405.

11. DAMAGES. OJI-CV Chapter 315.

CV 413.11 Damages *[Rev. 12/10/16]*

COMMENT

The Civil Damages Act, R.C. 4399.01, previously set forth in OJI-CV 413.07, was repealed 7/23/04. For damages instructions, see the specific damages instructions found in OJI-CV 413.03, OJI-CV 413.05, OJI-CV 413.09, and OJI-CV 413.13.

CV 413.13 Liability of social provider to a minor *[Rev. 12/10/16]*

1. GENERAL. A social (provider) (host) who provides intoxicating liquor or beer to a minor, or knowingly allows any minor to remain in or on the (premises) (property) of the social (provider) (host) while the minor is in possession of or consuming intoxicating liquor or beer, may be held liable for injuries to the minor that are caused by the intoxication of the minor.

COMMENT

Drawn from R.C. 4301.69.

2. PROOF OF CLAIM. Before you may find for the plaintiff, you must find by the greater weight of the evidence that

(A) the social (provider) (host) provided the intoxicating liquor or beer to the minor, or the social (provider) (host) possessed actual knowledge that the minor was consuming or possessing intoxicating liquor or beer on the social (provider's) (host's) premises; and

(B) the intoxication of the minor (proximately) (directly) caused the minor's (injury) (death) (property damage).

COMMENT

Drawn from R.C. 4301.69.

A social provider or host has a statutory duty under R.C. 4301.69 to refrain from furnishing alcohol to a minor. *Mitseff v. Wheeler*, 38 Ohio St.3d 112 (1988). Violating R.C. 4301.69(B) constitutes negligence per se and establishes the duty and breach elements of a negligence action; however, it is not a strict liability statute. *Huston v. Konieczny*, 52 Ohio St.3d 214 (1990); *Wesley v. Walraven*, 4th Dist. Washington No. 12CA18, 2013-Ohio-473.

A social provider or host is not liable to an "adult" who is underage, as defined in R.C. 4301.69, where the cause of the adult's injury or death is his/her own

voluntary intoxication. *Klever v. Canton Sachsenheim, Inc.*, 86 Ohio St.3d 419 (1999); *Kirchner v. Shooters on the Water, Inc.*, 167 Ohio App.3d 708, 2006-Ohio-3583 (8th Dist.).

In addition to the element of negligence, the plaintiff must establish that the intoxication of the minor was a proximate cause of his/her own injury, death, or property damage in order to recover against a social provider or host. Establishing a lapse of due care by the minor is not sufficient. It must be established that the minor's intoxication caused the lapse of due care. Although not the holding, see generally *Osler v. Lorain*, 28 Ohio St.3d 345 (1986).

3. MINOR. "Minor" means a person under the age of eighteen.

COMMENT

R.C. 4301.69.

4. UNDERAGE PERSON. "Underage person" means a person under the age of twenty-one.

COMMENT

R.C. 4301.69.

5. SOCIAL PROVIDER OR HOST. A "social provider" or "social host" means a person who receives guests by express or implied invitation to unlicensed premises, and for purposes of hospitality, (provides) (permits the consumption of) intoxicating liquor or beer to/by such guests.

COMMENT

Drawn from N.J. Stat. § 2A:15-5.5. *Hardester v. City of Long Branch*, D.N.J. No. 07-3454 (Feb. 22, 2013). The Ohio Liquor Control Law, R.C. Chapter 4301, does not define "social provider" or "social host."

6. INTOXICATING LIQUOR. R.C. 4301.01.

7. BEER. "Beer" includes all beverages brewed or fermented wholly or in part from malt products and containing one-half of one per cent or more of alcohol by volume.

COMMENT

R.C. 4301.01.

8. AFFIRMATIVE DEFENSE:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) PARENT, SPOUSE, LEGAL GUARDIAN. The defendant claims that despite being a social (provider) (host) that possessed actual knowledge that the minor was consuming or possessing intoxicating liquor or beer on the social (provider's) (host's) premises, he/she/it is excused if

(1) the intoxicating liquor or beer was given to the minro possessing or consuming it by that person's parent, spouse who is not an underage person, or legal guardian; and

(2) the parent, spouse who is not an underage person, or legal guardian was present at the time of the minor's possession or consumption of the intoxicating liquor or beer.

COMMENT

Drawn from R.C. 4301.69(B).

The Committee recognizes that there may be a statutory inconsistency regarding the age requirement of a parent, spouse, and legal guardian.

If the intoxicating liquor or beer is provided by a physician in the regular line of his/her practice or given for established religious purposes, see R.C. 4301.69(A).

9. NEGLIGENCE. OJI-CV Chapter 401.

10. CONCLUSION. OJI-CV Chapter 313.

11. PROXIMATE CAUSE. OJI-CV Chapter 405.

12. DAMAGES. OJI-CV Chapter 315.

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Chapter CV 415

INNKEEPERS

CV 415.01	Inn defined
CV 415.03	Guest defined
CV 415.05	Liability for loss of guest's property
CV 415.07	Proof of loss makes prima facie case
CV 415.09	Loss of goods after checkout
CV 415.11	Negligence of guest

CV 415.01 Inn defined

An inn is a house which is held out to the public as a place where transient persons who come in a fit condition will be received and entertained as guests, for compensation; as a public house for entertainment for all who choose to use it.

COMMENT

State v. Norval Hotel Co. (1921), 103 Ohio St. 361, 133 N.E. 75. R.C. 3731.01 defines a hotel for the purpose of the regulatory act. Whether a house where a guest is entertained is an inn or a private house, is said to be a question of fact. *Central Dist. of the Christian Alliance v. Merrill* (1917), 9 Ohio App. 273, 31 Ohio C.A. 417, but where the facts are undisputed it would seem that the question should be determined by the court.

CV 415.03 Guest defined

A guest is a traveler or wayfarer who comes to an inn or hotel for transient entertainment or accommodation, and is accepted there as such. The modern hotel has as its guests those who are accommodated overnight and those who may prolong their stay for months.

COMMENT

New Southern Hotel v. Kingston (App. 1936), 23 Ohio Law Abs. 115, 72 N.E.2d 782; *Arcade Hotel Co. v. Wiatt* (1886), 44 Ohio St. 32, 4 N.E. 398.

CV 415.05 Liability for loss of guest's property

If you find that the loss of plaintiff's property occurred on the premises of the defendant, the defendant has the burden of establishing by a preponderance of the evidence either that the loss was occasioned by the negligence of the plaintiff, or that it occurred while the property was in the exclusive custody and control of the plaintiff. With respect to plaintiff's loss of money, jewelry and baggage checks, in order to relieve himself from liability, the defendant must prove by a preponderance of the evidence:

(1) That he had in his inn a metal safe or vault in good order suitable for the custody of the property lost.

(2) That he kept suitable locks or bolts on the doors of the sleeping rooms used by his guests.

(3) That he kept suitable fastenings on the transoms and windows of such rooms.

(4) That copies of Revised Code Section 4721.01 were posted as therein required.

If you find by a preponderance of the evidence that the four conditions above enumerated existed, the defendant is not liable for the loss unless you further find that the plaintiff offered to deliver the property to the defendant for custody in the safe or vault and the defendant omitted or refused to take and deposit it and give the plaintiff a receipt therefor.

COMMENT

Rarrick v. Browne (1949), 151 Ohio St. 276, 39 O.O. 78, 85 N.E.2d 386.

CV 415.07 Proof of loss makes prima facie case

If you find by a preponderance of the evidence that the plaintiff was a guest of the defendant at the time of the loss of his property, and that he had left the property in question in his room in the hotel, and that it was taken therefrom without plaintiff's knowledge or consent, a prima facie case is made out for the plaintiff and it is not incumbent on the plaintiff to further prove that the loss of the property was occasioned by the fault or negligence of the defendant. In such event it is necessary for the defendant to proceed with its proof to overcome such prima facie case by establishing such facts as will exonerate the defendant from liability for the loss.

COMMENT

Palace Hotel Co. v. Medart (1912), 87 Ohio St. 130, 100 N.E. 317. But see *Rarrick v. Browne, supra.*

CV 415.09 Loss of goods after checkout

It is conceded that the plaintiff herein checked out of the hotel as a guest and by arrangement with the defendant stored his trunk and the contents thereof with the defendant. Under such circumstances, the defendant was required to exercise ordinary care for the safekeeping of plaintiff's property.

COMMENT

Hotels Statler Co., Inc. v. Safier (1921), 103 Ohio St. 638, 134 N.E. 460.

CV 415.11 Negligence of guest

An innkeeper is liable as an insurer of the goods of his guest committed to his care, against everything but the act of God or the public enemy, or the fraud or neglect of the guest himself, or his own servants or his traveling companion. The innkeeper is liable for a loss occasioned by his own servants, by his other guests, by robbery or burglary, or by rioters or mobs.

As it is not claimed that the act of God, the public enemy, the traveling companion, or servant of the guest, occasioned the loss in this case, the only question for your consideration is whether the plaintiff's own negligence caused, or directly contributed to, the loss of the property.

In legal contemplation, the property of a guest within the rooms of a public hotel is in the possession and under the control of the landlord or proprietor, in such a sense as to place it in his care, and subject him to responsibility for its loss, unless the guest, or his servant, or agent, or traveling companion, has it in his own personal and exclusive keeping and care.

If the coat was not left in the custody or care of the landlord, or his agents and servants, but was in the sole and exclusive keeping and custody of the plaintiff at the time of the loss, the defendants are not liable for its loss, it not being claimed that it was taken from the plaintiff's room.

The defendants had a right to require that the plaintiff should place his overcoat, etc., in a designated place in the office, or keep it in his own room when it is not on his own person, or in his own personal custody; and if they did so require and brought this requirement to the knowledge of the plaintiff; and if you shall find that the requirement was a reasonable one, and that the property was lost in consequence of the refusal or neglect of the plaintiff to comply with such reasonable precaution, he is not entitled to recover in this action.

The defendants had the right to make reasonable rules and regulations for their own protection, and to limit, to some extent, their liability; but, in order to so limit their liability in this case, it must be shown that the knowledge of the existence of such a rule or regulation was brought home to the plaintiff before the loss of his property.

A printed request merely posted in the rooms of the house, requesting or asking guests

to leave their overcoats or other baggage in the care of the landlord or his servants in the office, will not relieve the defendants from liability in case of its loss. To have this effect, the notice must state in clear and unequivocal terms that they will not be responsible for the loss unless the property is left in the office, or other designated place; and must be brought to the knowledge of the guest.

If the coat was taken into the plaintiff's own personal custody, and put or kept by him in a place not designated by the defendants, or their servants, and not kept for such purposes, and the attention of the defendants, one or any of their servants, was not called to it; and it was an unusual and manifestly hazardous and improper place to lay or hang such an article, and it was thereby lost, the defendants are not liable for such loss.

COMMENT

Fuller v. Coats (1868), 18 Ohio St. 343.

Chapter CV 417

MEDICAL NEGLIGENCE

CV 417.01 Introduction *[Rev. 3/17/18]*

CV 417.03 Standards of care: physician/surgeon *[Rev. 5/7/16]*

CV 417.05 Res ipsa loquitor *[Rev. 5/7/16]*

CV 417.07 Common law lack of informed consent: physician/surgeon *[Rev. 5/7/16]*

CV 417.09 Statutory defense, lack of informed consent: physician/surgeon R.C. 2317.54 *[Rev. 5/7/16]*

CV 417.11 Employees and agents: physician/surgeon *[Rev. 5/7/16]*

CV 417.13 Affirmative defense: patient negligence *[Rev. 5/7/16]*

CV 417.15 Hospitals *[Rev. 5/7/16]*

CV 417.17 Loss of less-than-even chance of survival/recovery *[Rev. 5/7/16]*

CV 417.19 Interrogatories (claims arising on and after 4/11/03) *[Rev. 5/7/16]*

CV 417.21 Verdict forms *[Rev. 5/7/16]*

CV 417.01 Introduction *[Rev. 3/17/18]*

COMMENT

These instructions may be modified for other health care providers including, but not limited to, dentists, chiropractic physicians, podiatric physicians, mental health professionals, nurses, specialized technicians, or operating room assistants. When appropriate, these instructions should be accompanied by an instruction on agency, hospital liability, or residential facility liability. *See* R.C. 2305.113.

R.C. 2305.234 provides immunity to certain health care providers under specified conditions. The Committee believes that immunity issues generally must be resolved by the trial judge. Rarely, an instruction may be necessary to resolve a disputed fact question.

Expert testimony unique to medical claims is addressed in R.C. 2743.43 and Evid.R. 601.

R. C. 2317.43(A), Ohio's apology statute, prohibits the admission in evidence, as an admission of liability or as evidence of an admission against interest, of a "statement . . . expressing apology" that expresses a feeling of regret for an unanticipated outcome of a patient's medical care even if it includes an acknowledgement that the patient's medical care fell below the applicable/required standard of care. *Stewart v. Vivian*, 151 Ohio St.3d 574, 2017-Ohio-7526. Application of the statute is a question of law for the court.

1. GENERAL. The plaintiff claims that the defendant (physician) (surgeon) negligently caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the defendant was negligent and that the defendant's negligence was a proximate cause of (injury) (damage) to the plaintiff.

CV 417.03 Standards of care: physician/surgeon *[Rev. 5/7/16]*

1. NONSPECIALIST. The existence of a (physician-patient) (surgeon-patient) relationship places on the (physician) (surgeon) the duty to act as a (physician) (surgeon) of reasonable skill, care, and diligence under like or similar conditions or circumstances. This is known as the standard of care. The standard of care is to do those things that a reasonably careful (physician) (surgeon) would do and to refrain from doing those things that a reasonably careful (physician) (surgeon) would not do. The required standard of care is the same throughout the United States. If you find by the greater weight of the evidence that the defendant failed to meet this standard of care, then you must find that he/she was negligent.

COMMENT

The standard of care is not limited by geographical considerations. *Berdyck v. Shinde*, 66 Ohio St.3d 573, 1993-Ohio-183; *Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976).

An instruction using "honest error or mistake in judgment" is not proper. A doctor can be exercising his/her best clinical judgment and still be negligent. *Kurzner v. Sanders,* 89 Ohio App.3d 674 (1st Dist.1993).

2. SPECIALIST. A specialist is a (physician) (surgeon) who holds himself/herself out as specially trained, skilled, and qualified in a particular branch of (medicine) (surgery). The defendant (physician) (surgeon) holds himself/herself out as a specialist in (*insert name of specialty*). The standard of care for a (physician) (surgeon) in the practice of a specialty is that of a reasonable specialist practicing (medicine) (surgery) exercising reasonable skill, care, and diligence under like and similar circumstances, regardless of where he/she practices. A specialist in any branch has the same standard of care as all other specialists in that branch. If you find by the greater weight of the evidence that the defendant failed to meet this standard of care, then you must find that he/she was negligent.

(Text continued on page 279)

COMMENT

The standard of care is not limited by geographical considerations. *Berdyck v. Shinde*, 66 Ohio St.3d 573, 1993-Ohio-183; *Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976).

3. DIFFERENT METHODS (ADDITIONAL). Although some other (physician) (surgeon) might have used a method of (diagnosis) (treatment) (procedure) different from that used by the defendant, this circumstance will not by itself prove that the defendant was negligent. You shall decide whether the (diagnosis) (treatment) (procedure) used by the defendant was in accordance with the required standard of care.

COMMENT

A "different methods" instruction should be given only if there is evidence that more than one method or diagnosis or treatment is acceptable for a particular medical condition. *Pesek v. University Neurologists Assoc.*, 87 Ohio St.3d 495, 2000-Ohio-483.

4. CUSTOMARY METHODS. The customary or routine method of (diagnosis) (treatment) (procedure) may be considered by you along with all of the other facts and circumstances in evidence. Although a particular method may be customary, usual, or routine, this circumstance will not by itself prove that method to be within the standard of care. You must decide whether the method of (diagnosis) (treatment) (procedure) used by the defendant was in accordance with the required standard of care.

COMMENT

Ault v. Hall, 119 Ohio St. 422 (1928).

5. BAD RESULT. The fact that the (physician's) (surgeon's) treatment did not (bring about a cure) (fulfill the plaintiff's expectations) does not by itself prove that the (physician's) (surgeon's) was negligent.

COMMENT

Ault v. Hall, 119 Ohio St. 422 (1928). This instruction may need to be modified if plaintiff claims a lack of informed consent.

6. FREEDOM FROM NEGLIGENCE (ADDITIONAL). You have heard evidence

that the plaintiff may have caused his/her medical condition by (*describe the plaintiff's actions in causing his/her condition*). The fact that the plaintiff may have (contributed to) (caused) his/her medical condition by (*describe the plaintiff's actions in causing his/her condition*) before coming under the care of the defendant is not relevant and shall not be considered by you. You must consider in this case only whether the defendant failed to meet the required standard of care and whether that failure, if any, was a proximate cause of any (injury) (damage) to the plaintiff.

COMMENT

Lambert v. Shearer, 84 Ohio App.3d 266 (10th Dist. 1992).

7. RES IPSA LOQUITUR. OJI-CV 417.05.

8. FORESEEABILITY (ADDITIONAL). Medical professionals are expected to recognize certain symptoms of illness and injury and are expected to be aware of the associated risk of harm during the course of (diagnosis) (treatment) (*describe other professional duty*). They are expected to be aware of the harm that a medical professional of ordinary skill, care, and diligence would foresee under the same or similar circumstances. Medical professionals, however, are not expected to guard against a risk of harm that a medical professional of ordinary skill, care, and diligence would not foresee.

COMMENT

Drawn from *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229. This instruction should be given only when there is a question for the jury regarding whether the physician knew or should have known that a chosen course of treatment involved a risk of harm.

9. CONCLUSION. OJI-CV Chapter 313.

10. PROXIMATE CAUSE. OJI-CV Chapter 405.

11. DAMAGES. OJI-CV Chapter 315.

CV 417.05 Res ipsa loquitor *[Rev. 5/7/16]*

COMMENT

Instructions on res ipsa loquitur should be given only when the court has determined that the evidence is sufficient to raise the issue of res ipsa loquitur.

Instructions on res ipsa loquitur may be given although the plaintiff alleges and seeks to prove specific acts of negligence. *Oberlin v. Friedman*, 5 Ohio St.2d 1(1965). If plaintiff alleges and offers proof of specific acts of negligence as well

as res ipsa loquitur, instructions will have to cover those specific acts. *Shields v. King*, 40 Ohio App.2d 77 (1st Dist. 1973).

The doctrine of res ipsa loquitur applies to procedures or occurrences as well as to the use of a single physical instrumentality, *Shields v. King*, 40 Ohio App.2d 77 (1st Dist. 1973); *Shannon v. Jaller*, 6 Ohio App.2d 206 (2nd Dist. 1966), and to several defendants acting together as well as to a single defendant, provided that the defendants include all of those in exclusive control of the instrumentality, procedure or occurrence. *Shields v. King, supra; Dearth v. Self*, 8 Ohio App.2d 33(4th Dist. 1966); *Bauer v. Pullman Co.*, 8 Ohio App.2d 1 (10th Dist. 1966).

See Annotation, *Physicians and Surgeons: Res Ipsa Loquitur, or Presumption or Inference of Negligence, in Malpractice Cases*, 82 A.L.R. 2d 1262 (1962); *see also* annotations on res ipsa loquitur in malpractice and hospital cases in current A.L.R.

1. EXCLUSIVE CONTROL CLAIM. One way a plaintiff may prove negligence is through circumstantial evidence. Circumstantial evidence (has been) (will be) defined for you. You may, but are not required to, find that the defendant was negligent if you decide by the greater weight of the evidence that

(A) the (*describe instrumentality, procedure, or occurrence*) alleged to have resulted in (injury) (damage) to the plaintiff was in the exclusive control of the defendant(s) at the time of the injury; and

(B) the (injury) (damage) to the plaintiff occurred under circumstances where (in the ordinary course of events) (reason and common experience indicate that) the (injury)(damage) would not have happened if the defendant(s) had exercised reasonable care.

2. EXCLUSIVE CONTROL BY DEFENDANT(S). The (*describe instrumentality, procedure, or occurrence*) must have been in the exclusive control of the defendant(s) and not in the control, even partially, of any other person(s).

3. CLAIM(S) OF DEFENDANT(S). The defendant(s) claim/claims that

(Use appropriate alternative[s])

(A) the defendant(s) /were not in exclusive control of the (*describe instrumentality, procedure, or occurrence*);

(or)

(B) the defendant(s) exercised reasonable care while in control of the (*describe instrumentality, procedure, or occurrence*);

(or)

(C) the (injury) (damage) would have occurred regardless of whether the defendant(s) exercised reasonable care;

(or)

(D) the (injury) (damage) was not caused by the (*describe instrumentality,*

procedure, or occurrence).

CV 417.07 Common law lack of informed consent: physician/surgeon *[Rev. 5/7/16]*

COMMENT

"Lack of informed consent" is a tort within the scope of medical negligence. Lack of consent may also be a battery. The usual complaint is that the doctor proceeded with treatment involving material risks about which the patient was not properly informed, resulting in an injury that a reasonable person would have avoided if properly informed. The wrong lies in the disregard of the patient's right to control his/her own body.

Under *Nickell v. Gonzalez*, 17 Ohio St.3d 136 (1985), Ohio has adopted the "material risk standard" of measuring the scope of the physician's duty to disclose, which measures that duty by the patient's need to know all risks material to an informed decision about treatment. In Ohio, the duty to disclose is not measured solely by the "professional standard," which embraces whatever the medical community or a reasonable physician would reveal under the circumstances. The "material risk standard" controls the need and the scope of expert testimony. See § 2 below. For a broad discussion of the issues under the "material risk standard," see *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977). R.C. 2317.54 governs certain written consents to medical and surgical procedures, but the Committee believes that the statute does not affect common law rights and liabilities between physicians or surgeons and their patients in general. *See* OJI-CV 417.09.

1. GENERAL. The plaintiff claims that the defendant failed to inform the plaintiff about the material risks in the (*describe therapy, treatment, surgery, or procedure*) that caused (injury) (damage) to the plaintiff. The plaintiff must prove by the greater weight of the evidence all of the following:

(A) the defendant failed to disclose to and discuss with the plaintiff the material risks and dangers inherently and potentially involved with respect to the proposed (*describe therapy, treatment, surgery, or procedure*);

(B) the risks and dangers that should have been disclosed by the defendant actually occurred and were a (proximate) (direct) cause of (injury) (damage) to the plaintiff; and

(C) a reasonable person in the plaintiff's position would have decided against the (*describe therapy, treatment, surgery, or procedure*) if the material risks and dangers inherent and incidental to it had been disclosed to him/her prior to the (*describe therapy, treatment, surgery, or procedure*).

2. RIGHT TO INFORMATION (OPTIONAL). Every adult has the right to decide what shall be done with his/her body and is entitled to be informed about the material risks in (*describe therapy, treatment, surgery, or procedure*) recommended by the (physician) (surgeon).

3. MATERIAL RISK. "Material risk" means a risk that a reasonable person, while in the condition that the physician knew or should have known the patient was in, would be likely to consider important in deciding whether or not to (forego) (refuse) the proposed (*describe therapy, treatment, surgery, or procedure*).

COMMENT

The substance of this instruction was approved in *Nickell v. Gonzales*, 17 Ohio St.3d 136 (1985). Expert medical testimony is necessary to establish the nature, the probabilities, and the magnitude of risks inherently and potentially involved with respect to a proposed treatment, as well as the nature of available alternatives, because these matters are beyond the knowledge of a lay person. *Ware v. Richey*, 14 Ohio App.3d 3 (8th Dist. 1983). The jury may decide from its own experience whether the risks in evidence are "material." However, expert medical testimony about what the professional standard of disclosure would be or what risks are important, although perhaps relevant under the professional standard, is not relevant to a determination of what information a reasonable patient should have in order to make an "informed" consent because the "material risk standard" is basically a reasonable person test. See *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977).

4. DUTY TO DISCLOSE. Not all risks of (injury) (damage) must be disclosed. The (physician) (surgeon) has the duty arising out of the (patient-physician) (patient-surgeon) relationship to disclose only the material risks of (injury) (damage) to the patient. Material risks will normally include the hazards naturally arising from the proposed (*describe therapy, treatment, surgery, or procedure*), the benefits to be expected, the alternatives to such (*describe therapy, treatment, surgery, or procedure*), if any, and the results likely if the patient remains untreated. The consent must be an informed consent. The standard is that of a reasonable (physician) (surgeon) advising a reasonable patient in the same or similar circumstances about risks likely to be significant to the decision to consent.

COMMENT

Drawn from *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238; *see also Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976).

5. EXCEPTIONS TO DUTY TO DISCLOSE. A (physician) (surgeon) is not required to disclose material risks when the patient is (unconscious or otherwise incapable of giving a reasonable and informed consent) (so ill or emotionally distraught that rational discussion of the circumstances and the proposed [*describe therapy, treatment, surgery, or procedure*] is impossible or would reasonably be expected to threaten the patient's well-being) when the (injury) (damage) from failure to immediately treat or proceed outweighs the risk of harm involved in the proposed

(*describe therapy, treatment, surgery, or procedure*). The standard is that of a reasonable (physician) (surgeon) facing the same or similar circumstances.

COMMENT

Drawn from *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238; *see also Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976).

6. FORESEEABILITY (ADDITIONAL). OJI-CV 417.03 § 8.

7. CONCLUSION. OJI-CV Chapter 313.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. DAMAGES. OJI-CV Chapter 315.

CV 417.09 Statutory defense, lack of informed consent: physician/surgeon R.C. 2317.54 *[Rev. 5/7/16]*

COMMENT

R.C. 2317.54 provides that a written consent conforming to the specific requirements of that section shall be presumed to be valid and effective, but that the use of such a form has no effect on the common law rights and liabilities between physicians and patients as they existed on 7/28/75.

The Committee takes no position on the nature and extent of the common law rights and liabilities that survive the enactment of R.C. 2317.54.

If a plaintiff overcomes the presumption contained in R.C. 2317.54, the instructions on common law informed consent, OJI-CV 417.07, are applicable.

1. GENERAL. The defendant claims that the plaintiff signed a valid, enforceable written consent. For the written consent to be valid and enforceable, the defendant must prove by the greater weight of the evidence that

(A) the written consent sets forth in general terms the nature and purpose of the (*describe procedure[s]*) and what the procedure(s) is/are expected to accomplish, together with the reasonably known risks, and the name(s) of the physician(s) who shall perform the intended surgical procedure(s); and

COMMENT

In the event of an emergency situation, this instruction must be modified by the trial judge to omit the requirement that the consent include the name of the physician(s) who shall perform the intended surgical procedure(s).

(B) the person making the consent acknowledges that such disclosure has been made and that all questions asked about the procedure(s) has/have been answered in a satisfactory manner; and

(C) the consent is signed by the patient for whom the procedure is to be performed, or, if the patient because of (*insert applicable reason[s] why patient lacks legal capacity to consent*) lacks legal capacity to consent, by a person who has legal authority to consent on behalf of such patient in such circumstances.

2. EXCEPTIONS. The plaintiff claims that his/her written consent to the (*describe procedure[s]*) is/are invalid. If the defendant has proven the previous requirements, then the written consent is valid unless the plaintiff proves by the greater weight of the evidence that

(Use appropriate alternative[s])

(A) the person who sought the written consent did not act in good faith;

(or)

(B) the signing of the written consent by (the plaintiff) (*describe person acting on behalf of the plaintiff*) was obtained by fraudulent misrepresentation of material facts;

(or)

(C) the person who signed the written consent was not able to communicate effectively in spoken and written (English) (*insert language in which the consent is written*).

3. FRAUDULENT MISREPRESENTATION OF MATERIAL FACT. OJI-CV Chapter 449.

CV 417.11 Employees and agents: physician/surgeon *[Rev. 5/7/16]*

1. GENERAL. A physician is responsible for the acts of a (nurse) (intern) (resident) (*describe other employee or agent*) when he/she is employed by the physician or when the physician has the right to control and direct that person's actions. If you find by the greater weight of the evidence that such (nurse) (intern) (resident) (*describe other employee or agent*) was under the control and direction of the physician and that such person was negligent, you must find that the physician was negligent.

2. LOANED SERVANT. A physician may acquire for a time the right to control the performance of an employee of (a hospital) (*describe other organization*) and direct the manner in which the employee's duties will be performed. The (hospital) (*describe other organization*) may surrender its right to control and direct the employee for the time being, even though the employee remains on the payroll of the (hospital) (*describe other organization*). Until the right to control and direct the employee's performance is knowingly and intentionally passed to the physician, the employee remains the employee of the (hospital) (*describe other organization*). If you find by the greater weight of the evidence that the physician had the right to control the

employee's performance and the right to direct the manner of the performance, then the act of the employee is the act of the physician. If you further find by the greater weight of the evidence that the employee was negligent in the scope of the task assigned by the physician, then you must find that the physician was negligent.

COMMENT

For the circumstances when a surgeon may be responsible for the negligence of a nurse-anesthetist who is on another's payroll, if the surgeon has the right to control the performance, see *Baird v. Sickler*, 69 Ohio St.2d 652 (1982).

See OJI-CV 417.15 for the hospital's responsibility.

See also AGENCY, OJI-CV Chapter 423.

CV 417.13 Affirmative defense: patient negligence *[Rev. 5/7/16]*

1. GENERAL. OJI-CV 303.03 § 4.

2. PATIENT NEGLIGENCE. The defendant claims that the plaintiff failed to exercise reasonable care for his/her own safety and that such failure was a proximate cause of the plaintiff's injury. A patient should accept and obey all reasonable (advice) (cautions) (instruction) (treatment) given to him/her after he/she has left the (hospital) (physician's office). A failure to do so may be a failure to use reasonable care for his/her own safety and well-being. If you find by the greater weight of the evidence that the plaintiff failed to exercise reasonable care and that failure was a proximate cause of the plaintiff's (injury) (damage), then he/she was negligent.

3. COMPARATIVE NEGLIGENCE/CONTRIBUTORY FAULT. OJI-CV Chapter 403.

COMMENT

For claims arising after 4/9/03, see R.C. 2315.32 et. seq.

Such negligence/fault must be contemporaneous with or subsequent to the malpractice of the physician. *Lambert v. Shearer*, 84 Ohio App.3d 266 (10th Dist. 1992).

4. PROXIMATE CAUSE. OJI-CV Chapter 405.

CV 417.15 Hospitals *[Rev. 5/7/16]*

1. GENERAL. The plaintiff claims that (*insert name of hospital*), through its employees who were acting within the scope of their employment, negligently caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the hospital was negligent and that the hospital's

negligence was a proximate cause of the plaintiff's (injury) (damage).

3. DUTY OF CARE. A hospital is negligent if it fails to exercise the same degree of care, skill, and diligence that a reasonably careful hospital offers under the same or similar circumstances, considering the level of services or skills offered by the hospital and what the hospital knew or should have known about the patient's physical condition, mental capacity and ability to care for himself/herself.

COMMENT

Although expert testimony is normally required to establish the standard of care, it may not be necessary when the average juror would be able to decide about negligence from his own experience. *Jones v. Hawkes Hosp.*, 175 Ohio St. 503 (1964). See *Ramage v. Central Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97, 1992-Ohio-109, for an extensive discussion.

4. PHYSICIAN'S INSTRUCTIONS (ADDITIONAL). Medical and surgical services are ordinarily left to the exclusive discretion of the physician in charge of the patient, and the hospital is generally not responsible for injuries caused to the patient if its employees follow the physician's instructions. You may find that the hospital was negligent if you find by the greater weight of the evidence that its employees failed to follow the physician's instructions, given orally or in writing, or that in carrying them out, the employees were negligent, or that the employees carried out instructions that were so (wrong) (improper) that a reasonably careful person with the (training) (experience) of the employees would (ask about their correctness) (refuse to follow them) in the exercise of ordinary care.

COMMENT

This instruction applies only to circumstances where the physician in charge is an independent contractor and not a hospital employee.

5. AGENCY BY ESTOPPEL (ADDITIONAL). A hospital is generally not responsible for the acts of (*describe independent medical practitioners*) who are not employees of the hospital. The employees of a hospital include only those persons whose performance the hospital has the right to control and direct. However, a hospital is responsible for the acts of a (*describe independent medical practitioners*) when the hospital holds itself out to the public as a provider of medical services and a reasonable patient, without notice or knowledge to the contrary, looks to the hospital, as opposed to the (*describe independent medical practitioners*), to provide competent medical care.

COMMENT

Drawn from *Clark v. Southview Hosp. & Family Health Center,* 68 Ohio St.3d 435, 1994-Ohio-519, syllabus.

6. LOANED SERVANT. If a hospital surrenders and the physician accepts the right to control and direct an employee of the hospital, then the physician and not the hospital is responsible for the employee's conduct.

COMMENT

If evidence is introduced of agency by estoppel, this instruction must be modified. *See* OJI-CV 417.15 § 5 and *Clark v. Southview Hosp. & Family Health Center*, 68 Ohio St.3d 435, 1994-Ohio-519, syllabus.

CV 417.17 Loss of less-than-even chance of survival/recovery *[Rev. 5/7/16]*

1. GENERAL. The plaintiff claims that (he/she lost a less-than even chance of recovery) ([*insert name of decedent*] lost a less-than-even chance of surviving) from his/her pre-existing (condition) (disease) as a result of the defendant's medical negligence. The law recognizes that even though (the plaintiff's loss of chance of recovery) ([*insert name of decedent's*] loss of chance of survival) from his/her preexisting (condition) (disease) was less than fifty percent, the plaintiff is entitled to compensation for the loss of any portion of that chance of (recovery) (survival) from the preexisting (condition) (disease) proximately caused by the defendant's medical negligence.

COMMENT

Roberts v. Ohio Permanente Medical Group, Inc., 76 Ohio St.3d 483, 1996-Ohio-375, overruling *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 27 Ohio St.2d 242 (1971). The loss-of-chance theory is now recognized. An example of how to apply the formula is provided in *Roberts* at 489. The Committee believes that instructions on wrongful death damages may be used as a guideline to calculate the "total amount of damages." For a discussion of calculating "total amount of damages," see Annotation, *Medical Malpractice: Measure and Elements of Damages in Actions Based on Loss of Chance*, 81 A.L.R. 4th 485 (2003); and Aagaard, *Identifying and Valuing the injury In Lost Chance Cases*, 96 Mich. L.Rev. 1335 (1998).

McMullen v. Ohio State Univ. Hosps., 88 Ohio St.3d 332, 2000-Ohio-342, limits the applicability of *Roberts*. This instruction should not be given when the defendant's negligence caused the ultimate harm unless the plaintiff is also offering loss of chance as an alternative theory for recovery. If the chance of recovery or

survival was 50% or more, the loss of chance theory does not apply.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant committed negligence; and

(B) the defendant's negligence proximately caused a decrease in (the plaintiff's loss of a less than even chance of recovery) ([*insert name of decedent's*] loss of less than even chance of survival) from his/her preexisting (condition) (disease).

COMMENT

Drawn from *Roberts v. Ohio Permanente Med. Group, Inc.*, 76 Ohio St.3d 483, 1996-Ohio-375; *Geesaman v. St. Rita's Medical Center*, 183 Ohio App.3d 555, 2009-Ohio-3931 (applying the theory of loss of chance of survival to a case involving recovery instead of survival).

McMullen v. Ohio State Univ. Hosp., 88 Ohio St.3d 332, 2000-Ohio-342, limits the applicability of *Roberts*. This instruction should not be given when the defendant's negligence caused the ultimate harm unless the plaintiff is also offering loss of chance as an alternative theory for recovery. If the chance of recovery or survival was 50% or more, the loss of chance theory does not apply.

3. MEDICAL NEGLIGENCE. OJI-CV 417.01.

4. AFFIRMATIVE DEFENSE. OJI-CV 417.11.

5. CONCLUSION. OJI-CV Chapter 313.

6. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV Chapter 313.

7. PROXIMATE CAUSE. OJI-CV 405.01.

8. DAMAGES. If you find by the greater weight of the evidence that the defendant was medically negligent and that his/her negligence caused (the plaintiff's loss of chance of recovery) ([*insert name of decedent*]'s loss of chance of survival), then you must decide how much that chance of (recovery) (survival) was (decreased) (lessened). You must decide the percentage of lost chance of (recovery) (survival) that was proximately caused by the defendant's negligence based on all the evidence presented. To decide the amount of damages as a result of the loss of chance of (recovery) (survival), you must

(A) consider the expert testimony presented and decide the total amount of damages from the date of the defendant's negligence, including, but not limited to, the loss of earnings and the loss of consortium; and

(B) decide the percentage of (the plaintiff's loss of chance of recovery) ([*insert name of decedent*]'s loss of chance of survival) from his/her preexisting (condition)

(disease) proximately caused by the defendant's negligence; and

(C) multiply that percentage by the total amount of damages in order to arrive at fair and just compensation.

For example:

$_____ (*insert total damages*) x _____ % (*insert percentage of lost chance of recovery or survival*) = $_____ (*insert resulting damages*).

COMMENT

Drawn from *Roberts v. Ohio Permanente Med. Group, Inc.*, 76 Ohio St.3d 483, 1996-Ohio-375.

9. INTRODUCTION TO INTERROGATORIES. You will be given written questions called interrogatories. You must answer them in writing, starting with the first question. You must carefully follow the directions about how to proceed because the directions will tell you which questions to answer and whether to sign the general verdict for the plaintiff or for the defendant.

A question is answered when at least (six) (three-fourths) of the jurors agree. All who agree must sign. If (six) (three-fourths) jurors cannot agree on an answer, you will be instructed to report to the court.

COMMENT

Ohio follows the "same juror" rule. *O'Connell v. Chesapeake & Ohio RR. Co.*, 58 Ohio St.3d 226 (1991). *But see Dillon v. OhioHealth Corp.*, 10th Dist. Nos. 13AP-467, 14AP-259, 2015-Ohio-1389, *appeal not accepted*, 144 Ohio St.3d 1407, 2015-Ohio-4947 (the court held that "a juror who failed to find negligence was still able to determine proximate cause").

10. INTERROGATORIES: LOSS OF CHANCE OF RECOVERY/SURVIVAL.

(A) WAS THE DEFENDANT NEGLIGENT?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more jurors to (A) is "yes," move to Interrogatory (B) and only those jurors answering "yes" may participate in answering Interrogatory (B).

(2) If the answer of (six) (three-fourths) or more jurors to (A) is "no," do not answer the remaining interrogatories, complete and sign the general verdict for the defendant and report to the court that you have completed your deliberations.

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (A), report this to the court.

(B) WAS THE DEFENDANT'S NEGLIGENCE A PROXIMATE CAUSE OF A LOSS OF A LESS THAN EVEN CHANCE OF (RECOVERY) (SURVIVAL) FROM (THE PLAINTIFF'S) (*INSERT NAME OF DECEDENT*)'S PRE-EXISTING (CONDITION) (DISEASE).

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more jurors to (B) is "yes," move to Interrogatory (C) and only those jurors answering "yes" may participate in answering Interrogatory (C).

(2) If the answer of (six) (three-fourths) or more jurors to (B) is "no," do not answer the remaining interrogatories, complete and sign the general verdict for the defendant, and report to the court that you have completed your deliberations.

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (B), report this to the court.

(C) WHAT CHANCE OF (RECOVERY) (SURVIVAL) FROM THE PRE-EXISTING CONDITION DID (THE PLAINTIFF) (*INSERT NAME OF DECEDENT*) HAVE PRIOR TO THE DEFENDANT'S NEGLIGENT ACT(S)?

_____ % (*Insert percentage*) (This percentage must be less than 50%.)

_____	_____
_____	_____
_____	_____
_____	_____

(D) WHAT PERCENTAGE OF CHANCE OF (RECOVERY) (SURVIVAL) FROM THE PRE-EXISTING CONDITION REMAINED AFTER THE DEFENDANT'S NEGLIGENCE?

_____ % (*Insert percentage*) (This percentage must be equal to or less than the chance of (recovery) (survival) of (the plaintiff) (*insert name of decedent*) prior to the defendant's negligent act(s), which is your answer to Interrogatory (C).)

_____	_____
_____	_____

_____ _____

_____ _____

COMMENT

After the jury determines the percentage of lost chance of (recovery) (survival), the jury must be instructed to determine the total amount of damages before completing the general verdict form for the plaintiff. All jurors may participate in the calculation of the total damages.

(E) DAMAGES. (*Insert all relevant Interrogatories regarding damages at CV 417.19*).

(F) VERDICT FOR PLAINTIFF. We, the jury, being duly impaneled and sworn, find in favor of the plaintiff and do further find that the total damages owing to be $_____ (*insert figure from calculation of total damages from Interrogatory E*) multiplied by _____ % (*Interrogatory C percentage minus Interrogatory D percentage*), which equals $_____, and we do so render our verdict upon the concurrence of _____ members of our jury, that being (six) (three-fourths) or more of our number. Each juror concurring in this verdict signs his/her name this _____ day of _____ 20_____.

_____ _____

_____ _____

_____ _____

_____ _____

(F) VERDICT FOR DEFENDANT. We, the jury, being duly impaneled and sworn, find in favor of the defendant, _____, and we do so render our verdict upon the concurrence of _____, members of our jury, that being (six) (three-fourths) or more of our number. Each juror concurring in this verdict signs his/her name this _____ day of _____, 20_____.

_____ _____

_____ _____

_____ _____

_____ _____

CV 417.19 Interrogatories (claims arising on and after 4/11/03) *[Rev. 5/7/16]*

COMMENT

R.C. 2323.43 provides for limits on compensatory damages representing noneconomic loss in medical, dental, optometric, or chiropractic claims and specifies that the trial judge, not the jury, applies the limits to the fact finder's

determination of total compensatory damages for noneconomic loss [R.C. 2323.43(A)(2) and (3)]; and states that the jury shall not be informed of the limit [R.C. 2323.43(D)(2)]. R.C. 2323.43(G)(1), (2) and (3) excludes such claims in specified cases.

The following interrogatories are required in all medical negligence cases. For interrogatories involving contributory negligence/fault, see OJI-CV Chapter 403, Comparative Negligence.

1. INTRODUCTION TO INTERROGATORIES. You will be given written questions called interrogatories. You must answer them in writing, starting with the first question. You must carefully follow the directions about how to proceed because the directions will tell you which questions to answer and whether to sign the general verdict for the plaintiff or for the defendant.

A question is answered when at least (six) (three-fourths) of the jurors agree. All who agree must sign. If (six) (three-fourths) of the jurors cannot agree on an answer, you will be instructed to report to the court.

2. INTERROGATORIES.

(A) NEGLIGENCE. WAS THE DEFENDANT NEGLIGENT?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of (six) (three-fourths) or more of the jurors to (A) is "yes," move to Interrogatory (B) and only those jurors answering "yes" may participate in answering Interrogatory (B).

If the answer of (six) (three-fourths) or more of the jurors to (A) is "no," do not answer the remaining interrogatories, complete and sign the general verdict for the defendant, and report to the court that you have completed your deliberations.

If (six) (three-fourths) of the jurors cannot agree on an answer to Interrogatory (A), report this to the court.

(B) WAS THE DEFENDANT'S NEGLIGENCE A PROXIMATE CAUSE OF ANY (INJURY) (DAMAGE) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of (six) (three-fourths) or more of the jurors to (B) is "yes," move to

Interrogatory (C) and all jurors may participate in answering the remaining interrogatories.

If the answer of (six) (three-fourths) or more of the jurors to (B) is "no," do not answer the remaining interrogatories, complete and sign the general verdict for the defendant, and report to the court that you have completed your deliberations.

If (six) (three-fourths) of the jurors cannot agree on an answer to Interrogatory (B), report this to the court.

(C) DID THE PLAINTIFF'S INJURIES INCLUDE EITHER OF THE FOLLOWING:

(1) PERMANENT AND SUBSTANTIAL PHYSICAL DEFORMITY, LOSS OF USE OF A LIMB, OR LOSS OF A BODILY ORGAN SYSTEM?

(2) PERMANENT PHYSICAL FUNCTIONAL INJURY THAT PERMANENTLY PREVENTS THE INJURED PERSON FROM BEING ABLE TO INDEPENDENTLY CARE FOR SELF AND PERFORM LIFE SUSTAINING ACTIVITIES?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____

If (six) (three-fourths) of jurors cannot agree on the answer to Interrogatory (C)(1) or (2), do not answer Interrogatory (C) and move to Interrogatory (D).

COMMENT

Interrogatory C should be used only when the evidence supports one or both of the findings at this Interrogatory (C)(1) or (2). R.C. 2323.43(A)(3).

(D) DAMAGES: ECONOMIC LOSS. WHAT PORTION OF THE COMPENSATORY DAMAGES, IF ANY, REPRESENTS PAST AND FUTURE ECONOMIC LOSS TO THE PLAINTIFF?

(1) ECONOMIC LOSS. "Economic loss" means any of the following:

(a) all wages, salaries or other compensation lost as a result of the plaintiff's claim; or

(b) all expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations as a result of the plaintiff's claim; or

(c) any other expenditures incurred as a result of the plaintiff's claim.

(i) PAST DAMAGES. "Past damages" means any damages that have accrued as a result of the plaintiff's claim up to the time that you reach your verdict.

(ii) FUTURE DAMAGES. "Future damages" means any damages that are reasonably certain to occur as a result of the plaintiff's claim after you reach your verdict.

PAST ECONOMIC DAMAGES	(A) $_____
FUTURE ECONOMIC DAMAGES	(B) $_____
TOTAL ECONOMIC DAMAGES	(A+B) $_____

_____ _____
_____ _____
_____ _____
_____ _____

If (six) (three-fourths) or more of the jurors cannot agree on the answer to Interrogatory (D), report this to the court.

Move to Interrogatory (E) and all jurors may participate.

(E) DAMAGES: NONECONOMIC LOSS. WHAT PORTION OF THE COMPENSATORY DAMAGES, IF ANY, REPRESENTS PAST AND FUTURE NONECONOMIC LOSS TO THE PLAINTIFF?

(1) NONECONOMIC LOSS. "Noneconomic loss" means pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training or education, disfigurement, mental anguish, and any other intangible loss experienced as a result of the plaintiff's claim.

(a) PAST DAMAGES. "Past damages" means any damages that have accrued as a result of the plaintiff's claim up to the time that you reach your verdict.

(b) FUTURE DAMAGES. "Future damages" means any damages that are reasonably certain to occur as a result of the plaintiff's claim after you reach your verdict.

PAST NONECONOMIC DAMAGES	(A) $_____
FUTURE NONECONOMIC DAMAGES	(B) $_____
TOTAL NONECONOMIC DAMAGES	(A+B) $_____

_____ _____
_____ _____

_____ _____

_____ _____

If (six) (three-fourths) or more of the jurors cannot agree on the answer to Interrogatory (E), report this to the court.

Move to Interrogatory (F).

(F) DAMAGES: TOTAL COMPENSATORY DAMAGES. STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES TO THE PLAINTIFF.

$_____*

*To determine this amount, add the total amount of damages for economic loss from Interrogatory (D) to the total amount of damages for noneconomic loss from Interrogatory (E), then enter the total amount on the Verdict for Plaintiff.

_____ _____

_____ _____

_____ _____

_____ _____

CV 417.21 Verdict forms ***[Rev. 5/7/16]***

1. VERDICT FOR PLAINTIFF.

We, the jury in this case, being duly impaneled and sworn, find in favor of the Plaintiff, _____ and do assess and determine the damages owing to Plaintiff as follows:

TOTAL compensatory damages $_____*

* **Total of economic and non-economic loss from Interrogatories (B) and (C).**
and we do so render our verdict upon the concurrence of _____ members of our said jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his/her name hereto this _____ day of _____, 20_____.

2. VERDICT FOR DEFENDANT.

We, the jury in this case, being duly impaneled and sworn, find in favor of the Defendant, _____ and we do so render our verdict upon the concurrence of _____ members of our said jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his/her name hereto this _____ day of _____, 20_____.

(Text continued on page 295)

Chapter CV 419

PHARMACISTS

CV 419.01 Standard of care: pharmacist *[Rev. 5/2/15]*

CV 419.01 Standard of care: pharmacist *[Rev. 5/2/15]*

1. GENERAL. The plaintiff claims that the defendant pharmacist negligently caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant, while acting as a pharmacist,

(*Use appropriate alternative*)

(1) failed to exercise the required standard of care;

(*or*)

(2) violated (*insert specific statutory duty*);

(B) and that this negligence proximately caused (injury) (damage) to the plaintiff.

3. REQUIRED STANDARD OF CARE. A pharmacist is required to exercise that degree of care customarily used under the same or similar circumstances by an ordinarily prudent and cautious person engaged in the practice of pharmacy.

COMMENT

Drawn from *Taugher v. Ling*, 127 Ohio St. 142 (1933), paragraph two of the syllabus.

4. PHARMACIST. "Pharmacist" means a person licensed under the law to engage in the practice of pharmacy.

COMMENT

R.C. 3715.05

5. PRACTICE OF PHARMACY. R.C. 4729.01.

6. IMPLIED WARRANTY OF FITNESS (ADDITIONAL). OJI–CV 505.15.

7. NEGLIGENCE. OJI-CV 401.01.

8. NEGLIGENCE PER SE (ADDITIONAL). The violation by a pharmacist of any (statute) (law) specifically designed to protect the public is negligence. If you find the defendant pharmacist violated (*describe statute or law*), then you must find the defendant negligent.

COMMENT

Eisenhuth v. Moneyhon, 161 Ohio St. 367 (1954).

9. CONCLUSION. OJI-CV Chapter 406.

10. PROXIMATE CAUSE. OJI-CV Chapter 405.

11. DAMAGES. OJI-CV Chapter 315.

[Next Page is 299]

Chapter CV 421

OTHER PROFESSIONAL NEGLIGENCE

CV 421.01 Introduction *[Rev. 3/5/16]*

CV 421.03 Standard of Care *[Rev. 3/5/16]*

CV 421.05 Affirmative defense: client negligence *[Rev. 3/5/16]*

CV 421.07 Interrogatories (claims arising on and after 4/9/2003) *[Rev. 3/5/16]*

CV 421.01 Introduction *[Rev. 3/5/16]*

1. GENERAL. The plaintiff claims that the defendant (attorney) (accountant) (architect) (designer) (engineer) (*describe other professional*) negligently caused (injury) (damage) to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the defendant was negligent and that the defendant's negligence was a proximate cause of (injury) (damage) to the plaintiff.

CV 421.03 Standard of Care *[Rev. 3/5/16]*

1. INTRODUCTION. This is a negligence claim brought by the plaintiff against the defendant (attorney) (accountant) (architect) (designer) (engineer) (*describe other professional*) to recover compensation for damages claimed to have been caused by the defendant's negligence. The plaintiff must prove by the greater weight of the evidence that the defendant was negligent and that the defendant's negligence was a proximate cause of (injury) (damage) to the plaintiff. A(n) (attorney) (accountant) (architect) (designer) (engineer) (*describe other professional*) is negligent if he/she fails to meet the required standard of care.

2. STANDARD OF CARE. The existence of a(n) (attorney) (accountant) (architect) (designer) (engineer) (*describe other professional*)-client relationship places on the (attorney) (accountant) (architect) (designer) (engineer) (*describe other professional*) the duty to act with the degree of skill, knowledge, care, and diligence normally applied by members of that profession under like or similar circumstances. This is known as the standard of care. If you find by the greater weight of the evidence that the defendant failed to meet this standard of care, then you shall find that he/she was negligent.

COMMENT

Drawn from *Richard v. Staehle*, 70 Ohio App.2d 93 (1980); *Strock v. Pressnell*, 38 Ohio St. 3d 207 (1988); Restatement of the Law 2d, Torts (1965), Section 299A.

Unlike medical negligence, there is no authority to support a different standard of care based on specialty.

A law firm does not engage in the practice of law and may not be held vicariously liable unless one of its principals or member lawyers has committed legal negligence (malpractice). *Nat'l Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601.

3. DIFFERENT METHODS (OPTIONAL). Although some other (attorney) (accountant) (architect) (designer) (engineer) (*describe other professional*) might have used a method of (*describe professional activity*) different from that used by the defendant, this circumstance does not by itself prove that the defendant was negligent. You shall decide whether the method used by the defendant was in accordance with the required standard of care.

COMMENT

Drawn from *Pesek v. University Neurologists Assoc.*, 87 Ohio St.3d 495, 2000-Ohio-483. A "different methods" instruction should only be given if there is evidence that more than one method is acceptable for a particular situation.

4. CUSTOMARY METHODS (OPTIONAL). The customary or routine method of (*describe professional activity*) may be considered by you along with all of the other facts and circumstances in evidence. Although a particular method may be customary, usual, or routine, this circumstance does not by itself prove that method to be within the standard of care. You shall decide by the greater weight of the evidence whether the method of (*describe professional activity*) used by the defendant was in accordance with the required standard of care.

COMMENT

Drawn from *Ault v. Hall* (1928), 119 Ohio St. 422.

5. BAD RESULT. The fact that the (work) (advice) of the (attorney) (accountant) (architect) (designer) (engineer) (*describe other professional*) did not fulfill the plaintiff's expectations does not by itself prove that the (attorney) (accountant) (architect) (designer) (engineer) (*describe other professional*) was negligent.

6. PLAINTIFF'S PRIOR CIRCUMSTANCES/CONDITION (OPTIONAL). You have heard evidence that the plaintiff may have (caused) (contributed to) the (circumstances) (condition) for which the plaintiff sought the defendant's services by (*describe plaintiff's actions in causing his/her circumstances or condition*). The fact that the plaintiff may have (caused) (contributed to) the (circumstances) (condition) for

which he/she sought the defendant's services before coming to the defendant is not relevant and should not be considered by you. You must consider only whether the defendant failed to meet the required standard of care and whether that failure, if any, was a proximate cause of any (injury) (damage) to the plaintiff.

COMMENT

Drawn from *Lambert v. Shearer*, 84 Ohio App.3d 266 (1992).

7. PROXIMATE CAUSE. OJI-CV Chapter 405.

8. FORESEEABILITY (ADDITIONAL).

COMMENT

In a medical negligence case, a special foreseeability instruction (OJI-CV 417.03 § 8) is required. *See Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229. The Committee believes that the reasoning of *Cromer* may also apply to other professional negligence cases.

9. AFFIRMATIVE DEFENSE: CLIENT NEGLIGENCE. OJI-CV 421.03.

10. CONCLUSION. OJI-CV Chapter 313.

11. PROXIMATE CAUSE. OJI-CV Chapter 405.

12. DAMAGES. OJI-CV Chapter 315.

CV 421.05 Affirmative defense: client negligence *[Rev. 3/5/16]*

1. GENERAL. OJI-CV 303.03 § 4.

2. CLIENT NEGLIGENCE. The defendant claims that the plaintiff was negligent by failing to exercise reasonable care for his/her own (safety) (well-being) (welfare) (*describe other economic interest*) and that such failure was a proximate cause of the plaintiff's (injury) (damage). A client should accept and obey all reasonable (advice) (caution) (instruction) given to him/her after he/she has engaged the services of the (attorney) (accountant) (architect) (designer) (engineer) (*describe other professional*). A failure to do so may be a failure to use reasonable care for his/her own (safety) (well-being) (welfare) (*describe other economic interest*). If you find by the greater weight of the evidence that the plaintiff failed to exercise reasonable care, then he/she was negligent.

3. COMPARATIVE NEGLIGENCE/CONTRIBUTORY FAULT. OJI-CV Chapter 403.

COMMENT

For claims for relief accruing after 4/9/2003, see R.C. §§ 2315.32 through .36.

4. PROXIMATE CAUSE. OJI-CV Chapter 405.

CV 421.07 Interrogatories (claims arising on and after 4/9/2003) ***[Rev. 3/5/16]***

COMMENT

The following interrogatories are required in all non-medical professional negligence cases. R.C. 2315.34. For interrogatories involving contributory negligence/fault, see OJI-CV Chapter 403.

1. INTRODUCTION TO INTERROGATORIES. You will be given written questions called interrogatories. You must answer them in writing, starting with the first question. You must follow carefully the directions about how to proceed because the directions will tell you what questions to answer and whether to sign the general verdict form for the plaintiff or for the defendant.

A question is answered when at least (six) (three-fourths) of the jurors agree. All who agree must sign. If (six) (three-fourths) of the jurors cannot agree on an answer, you should report this to the court.

2. INTERROGATORIES.

COMMENT

The following interrogatories are designed for only one plaintiff. If there is more than one plaintiff, a separate set of interrogatories should be used for each plaintiff.

Only those portions of the following interrogatories that are supported by some evidence should be used.

(A) WAS THE DEFENDANT NEGLIGENT?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more of the jurors to (A) is "yes," move to Interrogatory (B). In answering the following Interrogatory (B) about whether the defendant's conduct was a direct and proximate cause of the plaintiff's (injury) (damage), only those jurors who answered "yes" to Interrogatory (A) are qualified to participate in answering Interrogatory (B).

(2) If the answer of (six) (three-fourths) or more of the jurors to (A) is "no,"

(a) do not answer the remaining interrogatories, and

(b) sign the general verdict form for the defendant, and

(c) report to the court that you have completed your deliberations.

(3) If (six) (three-fourths) of the jurors cannot agree on an answer to Interrogatory (A), report this to the court.

COMMENT

Ohio follows the "same juror" rule. *O'Connell v. Chesapeake & Ohio RR. Co.* (1991), 58 Ohio St.3d 226, but see *Dillon v. OhioHealth*, 2015-Ohio-1389, (10th Dist.).

(B) WAS THE DEFENDANT'S NEGLIGENCE A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGE) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more of the jurors to (B) is "yes," move to Interrogatory (C), and all jurors shall participate.

(2) If the answer of (six) (three-fourths) or more of the jurors to (B) is "no,"

(a) do not answer the remaining Interrogatories, and

(b) sign the general verdict for the defendant, and

(c) report to the court that you have completed your deliberations.

(3) If (six) (three-fourths) of the jurors cannot agree on an answer to (B), report this to the court.

COMMENT

The Committee believes that since the issues relating to damages are analytically different from those relating to causal negligence, the determination of

damages may be made by all jurors without regard to their individual votes on causal negligence.

(C) PLEASE STATE THE FOLLOWING:

COMMENT

If evidence is presented regarding future damages, additional interrogatories may be required. See OJI-CV 417.19 for sample interrogatories and instructions.

(1) THE PORTION OF THE COMPENSATORY DAMAGES THAT REPRESENTS ECONOMIC LOSS OF THE PLAINTIFF: $_____

(a) To determine this amount, "economic loss" means any of the following:

(i) all wages, salaries or other compensation lost as a result of the defendant's negligence;

(ii) all expenditures for services, products, or accommodations as a result of the defendant's negligence;

(iii) all expenditures in order to repair or replace property injured or destroyed as a result of the defendant's negligence; and

(iv) any other expenditures or losses incurred as a result of the defendant's negligence.

COMMENT

Drawn from R.C. 2307.011(C)

_____	_____
_____	_____
_____	_____
_____	_____

(b) If (six) (three-fourths) or more of the jurors cannot agree on the answer to Interrogatory (C)(1), report this to the court.

(c) Move to Interrogatory (C)(2).

(2) THE PORTION OF THE COMPENSATORY DAMAGES THAT REPRESENTS NON-ECONOMIC LOSS OF THE PLAINTIFF: $_____

(a) To determine this amount, "non-economic loss" means pain and suffering, mental anguish, loss of society, consortium, companionship, care, assistance,

attention, protection, advice, guidance, counsel, instruction, training or education, and any other intangible loss experienced as a result of the defendant's negligence.

COMMENT

Drawn from R.C. 2307.011(F).

_____ _____
_____ _____
_____ _____
_____ _____

(b) If (six) (three-fourths) or more of the jurors cannot agree on the answer to Interrogatory (C)(2), report this to the court.

(c) Move to (C)(3).

(3) COMPLETION OF VERDICT FORM. The total amount of the compensatory damages sustained by the plaintiff is determined by adding the amount of damages for economic loss from Interrogatory (C)(1) to the amount of damages for non-economic loss from Interrogatory (C)(2). Enter the total amount on the Verdict Form for Plaintiff. Complete the verdict form for the plaintiff and notify the court that you have completed your deliberations.

COMMENT

R.C. 2307.22, 2307.23.

3. GENERAL VERDICT FORM. OJI-CV 403.01.

(Text continued on page 307)

Chapter CV 423

AGENCY

CV 423.01 Agency: contracts *[Rev. 11/17/18]*

CV 423.03 Agency: torts *[Rev. 11/17/18]*

CV 423.05 Joint venture *[Rev. 11/17/18]*

CV 423.07 Independent contractor *[Rev. 11/17/18]*

CV 423.01 Agency: contracts *[Rev. 11/17/18]*

COMMENT

For contract claims, the general instructions regarding contracts must be given to the jury. *See* OJI-CV Chapter 501 Contracts.

This instruction will be given only when the issue of agency is in dispute.

1. GENERAL. The plaintiff claims that the defendant is a principal and that the defendant's agent, (*insert name of agent*), entered into a contract with him/her/it (to) (for) (*describe subject matter of contract*). A principal is bound by (contracts made) (contracts broken) (action taken) on his/her/its behalf by an agent acting within the scope of the agent's authority.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(*Use appropriate alternative[s]*)

(A) (*insert name of alleged agent*) was acting by the express grant of authority of the defendant;

(*or*)

(B) (*insert name of alleged agent*) was acting with the apparent authority of the defendant;

(*or*)

(C) the defendant is responsible because of agency by estoppel;

(*or*)

(D) the defendant ratified the unauthorized act of (*insert name of alleged agent*).

3. PRINCIPAL. A "principal" is a person or entity who acts through an agent.

COMMENT

Drawn from 1 Restatement of the Law 3d, Agency, Section 1.01 (2006).

4. AGENT. An "agent" is one who acts for or in the place of and by authority of a principal. An agent stands in the shoes of the principal. An "agency relationship" is a consensual relationship between two parties in which the agent has the power to bind the principal by the agent's actions and the principal has the right to control the agent's actions.

COMMENT

Drawn from *State ex rel. Ohio Patrolmen's Benevolent Assn. v. State Emp. Relations Bd.*, 10th Dist. Franklin No. 05AP-526, 2006-Ohio-3263.

5. CONTROL (ADDITIONAL). The principal need not actually control the agent's actions. The principal need only have the right to do so.

COMMENT

An express delegation of authority may carry with it implied authority, the implied power to do all that is reasonably necessary to carry out the agent's task. *Damon's Missouri, Inc. v. Davis*, 63 Ohio St.3d 605 (1992).

6. EXPRESS AUTHORITY (ADDITIONAL). "Express authority" is that authority that is directly granted to or conferred upon the agent in express terms by the principal and extends only to such powers as the principal gives the agent in direct terms.

COMMENT

Master Consol. Corp. v. BancOhio Natl. Bank, 61 Ohio St.3d 570 (1991).

7. APPARENT AUTHORITY (ADDITIONAL). "Apparent authority" is the power to affect the principal's legal relations by transactions with third persons arising from the purported principal's representations to such third persons. Under a theory of apparent authority, evidence must show that

(A) the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him/her/it to act as having such authority, and

(B) the person dealing with the agent knew of this fact and acting in good faith had

reason to believe and did believe that the agent possessed the necessary authority. The apparent authority of an agent is to be determined by the act(s) of the principal and not by the act(s) of the agent.

COMMENT

Master Consol. Corp. v. BancOhio Natl. Bank, 61 Ohio St.3d 570 (1991).

8. AGENCY BY ESTOPPEL (ADDITIONAL). "Agency by estoppel" is created when a principal knowingly permits the agent to act as though the agent had such authority. Estoppel is the concept that the principal must compensate another for any change of position or loss induced by reliance on what the agent said or otherwise manifested, because it would be unjust to allow the principal to deny the truth of the agent's words or manifestations.

Under a theory of agency by estoppel, the plaintiff must prove that

(*Use appropriate alternative*)

(A) the defendant intentionally or carelessly caused such belief;

(*or*)

(B) the defendant, having notice of such belief and that it might induce others to change their positions, did not take reasonable steps to notify the plaintiff of the agent's lack of authority.

COMMENT

Mtge. Electronic Registration Sys., Inc., v. Tracie Mosley, 8th Dist. Cuyahoga No. 93170, 2010-Ohio-2886; 1 Restatement of the Law 3d, Agency, Section 2.05 (2006).

Some Ohio cases state that there is no difference between agency based on apparent authority and agency by estoppel. *Agosto v. Leisure World Travel, Inc.*, 36 Ohio App.2d 213 (10th Dist. 1973); *Majesky v. Ballmer*, 8th Dist. Cuyahoga No. 67624 (Jan. 19, 1995).

The Restatement provides that "[t]he doctrine is applicable when the person against whom estoppel is asserted has made no manifestation that an actor has authority as an agent but is responsible for the third party's belief that an actor is an agent and the third party has justifiably been induced by that belief to undergo a detrimental change in position." 1 Restatement of the Law 3d, Agency, Section 2.05 (2006).

9. RATIFICATION (ADDITIONAL). A principal "ratifies" the unauthorized act of his/her/its agent if the principal, with full knowledge of its terms, receives benefits from the agreement or ratifies the agreement.

COMMENT

Illinois Controls v. Langham, 70 Ohio St.3d 512 (1994).

10. PARTIALLY DISCLOSED AGENCY (ADDITIONAL). Where the existence of an agency is known to the third party but the identity of the principal is not known, the agent is held to be a party to the transaction and is liable to the third party, as is the agent's principal.

COMMENT

James G. Smith & Assocs., Inc. v. Everett, 1 Ohio App.3d 118 (10th Dist. 1981).

11. UNDISCLOSED AGENCY (ADDITIONAL). Where neither the existence of an agency nor the identity of the principal is known to the third party, the dealing is held to be between the agent and the third party and the agent is liable.

COMMENT

Should the identity of the principal be discovered, he/she/it may be held liable by the third party who must elect to pursue either the principal or agent. Both are not liable.

James G. Smith & Assocs., Inc. v. Everett, 1 Ohio App.3d 118 (10th Dist. 1981).

CV 423.03 Agency: torts *[Rev. 11/17/18]*

COMMENT

The following instruction will be given only when the issue of agency is in dispute.

For tort claims, the general instructions regarding torts must be given to the jury. *See* OJI-CV Title 4.

For torts involving employer/employee relations, see OJI-CV 537.07.

1. GENERAL. The plaintiff claims that the defendant is a principal and that the defendant's agent, (*insert name of agent*), who caused his/her/its (injury) (damages), did so while committing a tort. A principal is liable for the negligent acts of his/her/its agent acting within the scope of the agent's authority.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the

greater weight of the evidence that

(A) (*insert name of alleged agent*) was acting (by the express grant of authority) (with the apparent authority) of the defendant; and

(B) (*insert name of alleged agent*) acted negligently; and

(C) (*insert name of alleged agent*)'s negligence proximately caused the plaintiff's (injury) (damages).

3. PRINCIPAL. OJI-CV 423.01.

4. AGENT. OJI-CV 423.01.

5. CONTROL (ADDITIONAL). OJI-CV 423.01.

6. EXPRESS AUTHORITY (ADDITIONAL). OJI-CV 423.01.

7. APPARENT AUTHORITY (ADDITIONAL). "Apparent authority" is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations. When an agent acts with apparent authority, the agent's motivation is immaterial to the legal consequences that the agent's action carries for the principal. The fact that an agent's conduct is not beneficial to the principal does not shield the principal from legal consequences.

COMMENT

1 Restatement of the Law 3d, Agency, Section 7.08 (2006).

8. NEGLIGENCE. OJI-CV Chapter 401.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

CV 423.05 Joint venture *[Rev. 11/17/18]*

COMMENT

For contract claims, the general instructions regarding contracts must be given to the jury. *See* OJI-CV Chapter 501 Contracts.

1. GENERAL. The plaintiff claims that the defendant(s) organized and operated a joint venture known as (*insert name of joint venture*) for (*describe purpose of the joint venture*). Each joint venturer stands in the relation of principal, as well as agent, as to each of the other joint venturers. Each member of the joint venture is therefore bound

by (contracts made) (contracts broken) (action taken) (negligence) by the other member(s) of the joint venture.

COMMENT

Al Johnson Constr. Co. v. Kosydar, 42 Ohio St.2d 29 (1975).

2. JOINT VENTURE. A joint venture is an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill and knowledge, without creating a partnership, and agree that there shall be a community of interest among them as to the purpose of the undertaking.

COMMENT

Ford v. McCue, 163 Ohio St. 498 (1955); *Kahle v. Turner*, 68 Ohio App.2d 49 (12th Dist. 1979).

3. PRINCIPAL. OJI-CV 423.01.

4. AGENT. OJI-CV 423.01.

5. CONTROL (ADDITIONAL). One joint venturer may surrender control of a part of the venture to another joint venturer without defeating the existence of the joint venture.

COMMENT

Ford v. McCue, 163 Ohio St. 498 (1955); *Kahle v. Turner*, 66 Ohio App.2d 49 (12th Dist. 1979).

CV 423.07 Independent contractor *[Rev. 11/17/18]*

COMMENT

This instruction will be given only if there is a dispute as to whether a person is acting as an agent of the defendant or was an independent contractor of the defendant. This instruction cannot be used in workers' compensation cases where the statutory test in R.C. 4123.01(A)(1)(c) applies. *See* OJI-CV Chapter 427. If the person is an employee of the defendant, see OJI-CV Chapter 537.

1. GENERAL. The plaintiff claims that at the time of the (*describe nature of the*

plaintiff's claim) (*insert name of subject individual*) was an agent of the defendant. The defendant claims (*insert name of subject individual*) was an independent contractor. The defendant is liable for the negligent acts of his/her/its agents. The defendant is not liable for the negligent acts of an independent contractor.

2. AGENCY. OJI-CV 423.01.

3. INDEPENDENT CONTRACTOR.

(A) A person is an independent contractor if, in the performance of his/her/its work, he/she/it is in control of the manner or means of doing the work regardless of whether the person is subject to another as to the result. It is the right to control and not the exercise of the right that constitutes the test.

(B) In deciding whether (*insert name of subject individual*) was an agent or an independent contractor, you must consider multiple factors, which include but are not limited to the following: (1) who controls the details and quality of the work; (2) who controls the hours worked; (3) who selects the materials, tools, and personnel used; (4) who selects the routes traveled; (5) the length of employment; (6) the type of business; (7) the method of payment; and (8) any pertinent agreements or contracts. None of these factors are dispositive by themselves.

COMMENT

"The question whether one is an employee or an independent contractor has been considered in many cases, and various tests have been applied in determining it, although it has been said that it is impossible to lay down a rule by which the status of men working and contracting together can be clearly defined in all cases as employees or independent contractors, for each case must depend on its own facts, and ordinarily no one feature of the relation is determinative, but all must be considered together; and ordinarily it is said to be a question of fact."

Bobik v. Industrial Com., 146 Ohio St. 187 (1981); *State ex rel. Nese v. State Teachers Ret. Bd. of Ohio*, 136 Ohio St.3d 103, 2013-Ohio-1777.

4. EXCEPTION (ADDITIONAL).

(A) NONDELEGABLE DUTIES. Even if you determine that (*insert name of subject individual*) is an independent contractor, you may still find the defendant liable to the plaintiff for his/her/its negligent acts if by (statue) (contract) (franchise) (charter) (common law) the defendant was prohibited from delegating the duty he/she/it had to the plaintiff.

COMMENT

Drawn from *Strayer v. Lindeman*, 68 Ohio St.2d 32 (1981), and R.C. 5321.04 Obligations of Landlord.

(B) DANGERS TO OTHERS. Even if you determine that (*insert name of subject individual*) is an independent contractor, you may still find the defendant liable to the plaintiff if the work itself creates a danger to others, i.e., inherently dangerous work.

COMMENT

Drawn from *Pusey v. Bator*, 94 Ohio St. 3d 275, 2002-Ohio-795.

Chapter CV 425

GOVERNMENTAL LIABILITY

CV 425.01	Negligent operation of motor vehicles
CV 425.03	Negligence in proprietary functions
CV 425.05	Maintenance of roads and bridges
CV 425.07	Negligence within government buildings or grounds
CV 425.09	Civil liability expressly imposed by a Revised Code section R.C. 2744.02(B)(5) (claims arising on and after 9/29/07) *[Rev. 2/24/18]*
CV 425.11	Defenses—immunities R.C. 2744.03 (claims arising on and after 4/9/03) *[Rev. 2/24/18]*
CV 425.13	Statute of limitations
CV 425.15	Damages

(The following instructions apply to claims arising after November 30, 1985, except for damage limits in R.C. 2744.05 which may apply to earlier claims.)

CV 425.01 Negligent operation of motor vehicles R.C. 2744.02(B)(1) (modifying former R.C. 701.02)

1. GENERAL. The defendant (*identify the governmental unit*) is a political subdivision of the State of Ohio. (Except for emergency situations which the court will describe,) a political subdivision is liable if its employee causes (injury) (death) (damage) by the negligent operation of a motor vehicle upon the public roads, highways, or streets, while the employee is engaged within the scope of his employment and authority.

COMMENT

R.C. 2744.01(F) defines a "political subdivision." Whether a particular governmental unit is a "political subdivision" will be a question of law.

2. IMMUNITY FOR EMERGENCIES.

(A) POLICE EMERGENCIES. A political subdivision has no legal responsibility for damage caused by a member of its police (department) (agency) who was operating a motor vehicle while responding to an emergency call.

COMMENT

R.C. 2744.02(B)(1)(a).

(1) EMERGENCY CALL. An "emergency call" means a call to duty including, but not limited to (communications from citizens) (police dispatches) (personal observations by peace officers of inherently dangerous situations) that demand an immediate response on the part of a peace officer.

COMMENT

R.C. 2744.01(A) (no counterpart in former statute).

(2) RESPOND. An officer responds to an emergency call if he reasonably believes there is an urgent call to duty, regardless of the presence or absence of any actual danger or any actual need for the officer's presence there.

COMMENT

Agnew v. Porter (1970), 23 Ohio St.2d 18, 52 O.O.2d 79, 260 N.E.2d 830; *Lingo v. Hoekstra* (1964), 176 Ohio St. 417, 27 O.O.2d 384, 200 N.E.2d 325; *Fish v. Coffey* (1986), 33 Ohio App.3d 129, 514 N.E.2d 896; *Litchfield v. Morris* (1985), 25 Ohio App.3d 42, 495 N.E.2d 462.

(B) FIRE EMERGENCIES. A political subdivision has no legal responsibility for damage caused by a member of its (fire department) (firefighting agency), when he was operating a motor vehicle while (proceeding toward a place where a fire was ([in progress] [believed to be in progress]) (answering an emergency alarm).

COMMENT

R.C. 2744.02(B)(1)(b) (modifies former R.C. 701.02).

(C) EMERGENCY MEDICAL SERVICE. A political subdivision has no legal responsibility for damage caused by a member of an emergency medical service which it (owns) (operates), when he was operating a motor vehicle with a valid (driver's) (commercial driver's) license, while (responding to) (completing) a call for emergency medical care, and while complying with precautions for emergency vehicles.

(Text continued on page 317)

COMMENT

R.C. 2744.02(B)(1)(c).

(1) PRECAUTIONS FOR EMERGENCY VEHICLES. The driver of an (emergency) (public safety) vehicle, when responding to an emergency call, upon approaching a (red or stop signal) (stop sign), shall slow down as necessary for safety to traffic, but may proceed cautiously past such (red or stop signal) (stop sign) with due regard for the safety of all persons using the street or highway.

COMMENT

R.C. 4511.03. Only emergency *medical* vehicles need comply with R.C. 4511.03 to maintain immunity, but any emergency vehicle's failure to comply with R.C. 4511.03 may constitute wilful or wanton misconduct which precludes immunity.

(D) EXCEPTION TO IMMUNITY. However, a political subdivision is always legally responsible when its employee's operation of a motor vehicle constitutes wilful or wanton misconduct.

(1) WILFUL OR WANTON MISCONDUCT. OJI-CV 401.41.

3. BURDEN OF PROOF.

(A) GENERAL. In order to recover, the plaintiff must prove by the greater weight of the evidence that the political subdivision's employee negligently caused the plaintiff's (injury) (death) (damage).

(B) EMERGENCY DEFENSE. The political subdivision can avoid liability if it proves by the greater weight of the evidence that its employee's emergency situation excused its responsibility for any employee negligence. (However, the plaintiff can still recover if the plaintiff proves by the greater weight of the evidence that the political subdivision's employee operated the vehicle in a wilful or wanton manner, so the political subdivision lost any special protection for emergency activities.)

CV 425.03 Negligence in proprietary functions

1. GENERAL. The defendant (*identify the governmental unit*) is a political subdivision of the State of Ohio. It is liable if its employee causes (injury) (death) (damage) by his negligent performance of an act or acts within the scope of his employment for a proprietary function of that political subdivision.

COMMENT

R.C. 2744.02(B)(2) (no counterpart in former statute).

(A) EMPLOYEE. A person is an "employee" of a political subdivision if he is an ([officer] [agent] [employee] [servant]) (whether or not compensated) (whether full-time or part-time), who is authorized to act for a political subdivision.

COMMENT

R.C. 2744.01(B).

(*Use any appropriate alternative*)

("Employee" does not include an independent contractor.)

COMMENT

For definition of "independent contractor" See OJI-CV 423.09.

("Employee" includes any elected or appointed official of a political subdivision.)

("Employee" includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work for a political subdivision.)

("Employee" includes a child whom the juvenile court has found to be a delinquent and has ordered to perform community service or community work for a political subdivision.)

(B) IDENTIFYING A PROPRIETARY FUNCTION. The decision whether a particular activity relates to a proprietary function is a matter of law for the court. I instruct you that _____ is a proprietary function (and that _____ is not a proprietary function).

COMMENT

R.C. 2744.01(G) defines "proprietary function."

CV 425.05 Maintenance of roads and bridges

1. GENERAL. The defendant (*identify the governmental unit*) is a political subdivision of the State of Ohio. It is liable for (injury) (death) (damage) caused by its failure to keep public (roads) (highways) (streets) (avenues) (alleys) (sidewalks) (bridges) (aqueducts) (viaducts) (grounds) in that political subdivision open, in repair, and free from nuisance.

COMMENT

R.C. 2744.02(B)(3) (modifies former R.C. 305.12 and 723.01).

A municipal corporation has no liability for damage caused by the condition of a bridge within its territory if it has no responsibility for maintaining or inspecting that bridge. *Carney v. McAfee* (1988), 35 Ohio St.3d 52, 517 N.E.2d 1374.

2. FAILURE TO MAINTAIN AREAS OPEN, IN REPAIR, AND FREE FROM NUISANCE. A political subdivision does not guarantee the safety of its public (roads) (highways) (streets) (avenues) (alleys) (sidewalks) (bridges) (aqueducts) (viaducts) (grounds). However, a political subdivision has a duty to exercise reasonable care to maintain that area in a reasonably safe condition for ordinary and customary travel or use.

3. REASONABLE CARE. OJI-CV 401.01.

4. REPAIRS. Reasonable care includes a duty to exercise the care a reasonable person would exercise to remedy an unsafe condition within a reasonable time after obtaining knowledge or notice about that condition. A political subdivision has no duty to remedy a condition which it did not create and about which it lacks knowledge or notice for a sufficient time to afford it a reasonable opportunity to remedy that condition.

COMMENT

Bello v. Cleveland (1922), 106 Ohio St. 94, 138 N.E. 526; *Leipsic v. Gerdeman* (1903), 68 Ohio St. 1, 67 N.E. 87.

5. NOTICE.

(A) ACTUAL NOTICE. A political subdivision has actual notice of an unsafe condition when its employees who are responsible for maintaining that area know about that condition (from their own observations) (from oral or written statements to them by others).

(B) CONSTRUCTIVE NOTICE. A political subdivision has constructive notice of an unsafe condition when it exists for a sufficient time under circumstances that the political subdivision should have known about it by the exercise of reasonable care.

COMMENT

Beebe v. Toledo (1958), 168 Ohio St. 203, 6 O.O.2d 1, 151 N.E.2d 738; *Bello v. Cleveland* (1922), 106 Ohio St. 94, 138 N.E. 526; *Reeves v. Cincinnati* (1960), 111 Ohio App. 387, 14 O.O.2d 37, 171 N.E.2d 178.

6. NATURAL ACCUMULATIONS OF ICE AND SNOW. A political subdivision has no duty to remove natural accumulations of ice and snow from its (streets) (sidewalks). People are expected to know about and protect themselves against slipperiness caused by natural accumulations of ice and snow, which is a normal incident of winter.

COMMENT

Lopatkovich v. Tiffin (1986), 28 Ohio St.3d 204, 503 N.E.2d 154; *Ditmyer v. Bd. of Cty. Commrs.* (1980), 64 Ohio St.2d 146, 18 O.O.3d 372, 413 N.E.2d 829.

7. INCREASED DANGER FROM ICE AND SNOW ON AN UNSAFE CONDITION. A natural accumulation of ice and snow does not relieve a political subdivision from responsibility for an unsafe condition which it (caused) (permitted to remain) by its failure to exercise reasonable care, even though the ice and snow increase the danger from that condition.

COMMENT

McCave v. Canton (1942), 140 Ohio St. 150, 23 O.O. 365, 42 N.E.2d 762; *Christen v. Cincinnati* (1939), 62 Ohio App. 528, 15 O.O. 426, 24 N.E.2d 17.

8. UNNATURAL ACCUMULATIONS OF ICE AND SNOW. A political subdivision is negligent if it fails to exercise reasonable care and thereby (creates) (fails to remedy) a condition which causes an unnatural accumulation of ice or snow on its (highway) (street) (alley) (sidewalk) (bridge) (grounds).

COMMENT

McCave v. Canton (1942), 140 Ohio St. 150, 23 O.O. 365, 42 N.E.2d 762; *Norwalk v. Tuttle* (1906), 73 Ohio St. 242, 76 N.E. 617.

9. CONTRIBUTORY NEGLIGENCE. OJI-CV Chapter 403.

CV 425.07 Negligence within government buildings or grounds R.C. 2744.02(B)(4) (no counterpart in former statute)

1. GENERAL. The defendant (*identify the governmental unit*) is a political subdivision of the State of Ohio. It is liable if its employee(s) cause(s) (injury) (death) (damage) by failing to exercise reasonable care within or on the grounds of a building that is used in connection with the performance of a governmental function (including

[an office building] [a courthouse]) (but not including a [jail] [place of juvenile detention] [workhouse] [detention facility as defined by R.C. 2921.01]).

CV 425.09 Civil liability expressly imposed by a Revised Code section R.C. 2744.02(B)(5) (claims arising on and after 9/29/07) *[Rev. 2/24/18]*

1. GENERAL. The plaintiff claims that the defendant (*identify the governmental unit*) caused (injury) (death) (damages) to the plaintiff. The defendant

(*Use appropriate alternative[s]*)

(A) denies (*describe conduct denied*);

COMMENT

Unlike R.C. 2744.02(B)(1) through (4), R.C. 2744.02(B)(5) is not limited to negligent actions. Therefore, the conduct involved need not be negligent in nature. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946.

(*or*)

(B) claims that it is immune from liability.

2. PROOF OF CLAIM. The plaintiff must prove by the greater weight of the evidence that the defendant's employee caused the plaintiff's (injury) (death) (damages) by (*describe the employee's conduct creating liability under R.C. 2743.02, R.C. 5591.37, or other Revised Code section*).

COMMENT

Drawn from R.C. 2744.02(B)(5).

R.C. 2744.02(B)(5) imposes liability for the specified actions of political subdivisions of the state of Ohio only if a Revised Code section expressly imposes liability. "Expressly" means "in direct or unmistakable terms." *Butler v. Jordan*, 92 Ohio St.3d 354 (2001) (plurality). Civil liability does not exist merely because a section imposes a responsibility or mandatory duty upon a political subdivision, because a section provides for a criminal penalty, because of a general authorization that a political subdivision may be sued, or because a section uses the term "shall" in a provision pertaining to a political subdivision. *See* R.C. 2744.02(B)(5).

R.C. 2744.01 defines "political subdivision." Whether a particular governmental unit is a "political subdivision" of the state of Ohio is a question of law.

The trial judge should draft appropriate instructions for the applicable Revised Code section, including all definitional instructions and affirmative defenses relevant to that section.

3. EMPLOYEE. R.C. 2744.01.

4. PROXIMATE CAUSE. OJI-CV Chapter 405.

5. DAMAGES. OJI-CV Chapter 315.

6. CONCLUSION. OJI-CV Chapter 313.

7. CONCLUSION WITH AFFIRMATIVE DEFENSE. OJI-CV Chapter 313.

CV 425.11 Defenses—immunities R.C. 2744.03 (claims arising on and after 4/9/03) *[Rev. 2/24/18]*

COMMENT

R.C. 2744.02(A)(1) provides a general grant of immunity to political subdivisions and their employees. R.C. 2744.02(B) establishes statutory exceptions to this grant of immunity. R.C. 2744.03 then provides for defenses or immunities relating to acts or omissions not protected under the general grant of immunity.

1. GENERAL. The plaintiff claims that (*identify the political subdivision*) (*insert name of the defendant political subdivision employee*) caused (injury) (death) (damages) to the plaintiff. The defendant claims that he/she/it is immune from liability.

2. PROOF OF DEFENSE. The defendant claims that he/she/it is not liable for (injury) (death) (damages) caused by (*describe employee's conduct creating liability*). You must find for the defendant if you find by the greater weight of the evidence that

(*Use appropriate alternative[s]*)

COMMENT

R.C. 2744.03(A)(1) through (5) apply only to a political subdivision. R.C. 2744.03(A)(6) applies only to a political subdivision employee, not to a political subdivision. R.C. 2744.03(A)(7) applies to both a political subdivision and a political subdivision employee.

(A)(1) (*insert name of the political subdivision's employee*) was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function;

COMMENT

Drawn from R.C. 2744.03(A)(1).

The Committee believes that whether a defendant has established the elements of the defense provided in R.C. 2744.03(A)(1) is ordinarily a question of law. The trial judge should give an instruction on R.C. 2744.03(A)(1) and any necessary

definitions only if there is a factual issue relevant to application of the defense.

(*or*)

(A)(2) (*insert name of the political subdivision's employee*) was engaged in conduct that was not negligent and was ([required] [authorized] by law) ([necessary] [essential] to the exercise of powers of the [*insert name of political subdivision*] [*insert name of the political subdivision's employee*]);

COMMENT

Drawn from R.C. 2744.03(A)(2).

(*or*)

(A)(3) the (act) (failure to act) of (*insert name of the political subdivision's employee*) was within the discretion of (*insert name of the political subdivision's employee*) with respect to (policy-making) (planning) (enforcement powers) by virtue of his/her duties and the responsibilities of his/her (office) (position);

COMMENT

Drawn from R.C. 2744.03(A)(3).

The Committee believes that whether a defendant has established the elements of the defense provided in R.C. 2744.03(A)(1) is ordinarily a question of law. The trial judge should give an instruction on R.C. 2744.03(A)(1) and any necessary definitions only if there is a factual issue relevant to application of the defense.

(*or*)

(A)(4) the (act) (failure to act) of (*insert name of the political subdivision's employee*) resulted in (injury) (death) (damages) to a (person who had [been convicted of] [pleaded guilty to] a criminal offense and who, at the time of the [injury] [death] [damages], was serving any portion of the person's sentence by performing community service work for or within the [*insert name of the political subdivision*]) (child who was found to be a delinquent child and who, at the time of the [injury] [death] [damages], was performing community [service] [work] for or within the [*insert name of the political subdivision*] in accordance with a juvenile court order) and the (person) (child) was covered under workers' compensation in connection with the community (service) (work) for or within the (*insert name of the political subdivision*);

COMMENT

Drawn from R.C. 2744.03(A)(4).

The Committee believes that whether the person performing community service work was doing so pursuant to R.C. 2951.02 or otherwise, whether the juvenile court order was entered pursuant to R.C. 2152.19 or R.C. 2152.20, or whether the person or child was covered under R.C. Chapter 4123 are questions of law. If there are factual issues involved in these determinations, the trial judge must give appropriate instructions.

For a list of what is within a political subdivision's geographic area, see the definition of "political subdivision" in R.C. 2744.01.

(*or*)

(A)(5) (*insert name of the political subdivision's employee*) exercised judgment or discretion in determining (whether to acquire) (how to use) any (equipment) (supplies) (materials) (personnel) (facilities) (*describe other resources*) and that exercise of judgment or discretion resulted in the plaintiff's (injury) (death) (damages), unless (*insert name of the political subdivision's employee*) exercised his/her judgment or discretion (with malicious purpose) (in bad faith) (in a wanton or reckless manner);

COMMENT

Drawn from R.C. 2744.03(A)(5).

(*or*)

(A)(6) he/she was (*describe circumstances granting a defense or immunity under the common law or established by the Revised Code*), unless his/her (acts) (omissions) were (manifestly outside the scope of his/her employment or official responsibilities) (with malicious purpose) (in bad faith) (in a wanton or reckless manner);

COMMENT

Drawn from R.C. 2744.03(A)(6)(a) and (b). This defense applies only to a political subdivision employee, not to a political subdivision.

R.C. 2744.03(A)(6)(c) provides that an employee is not immune from liability when civil liability is expressly imposed upon the employee by a Revised Code section. "Expressly" means "in direct or unmistakable terms." *Butler v. Jordan*, 92 Ohio St.3d 354 (2001) (plurality). Civil liability does not exist merely because a section imposes a responsibility or mandatory duty upon an employee, because a section provides for a criminal penalty, because of a general authorization in a section that an employee may be sued, or because a section uses the term "shall" in a provision pertaining to an employee. *See* R.C. 2744.03(A)(6)(c).

R.C. 2744.03(B) provides that any defense for a political subdivision employee under R.C. 2744.03(A)(6) does not affect or limit the liability of a political

subdivision for an act or omission of that employee under R.C. 2744.02.

(*or*)

(A)(7) (the [*insert name of political subdivision*]) ([*insert name of political subdivision's employee*] was a [county prosecuting attorney] [city director of law] [village solicitor] [*describe similar chief legal officer of a political subdivision*] [assistant of a (county prosecuting attorney) (city director of law) (village solicitor) (*describe similar chief legal officer of a political subdivision*)] [judge of a court of Ohio] and) was (*describe circumstances granting a defense or immunity under the common law or established by the Revised Code*).

COMMENT

Drawn from R.C. 2744.03(A)(7).

R.C. 2744.03(B) provides that any defense for a political subdivision employee under R.C. 2744.03(A)(7) does not affect or limit the liability of a political subdivision for an act or omission of that employee under R.C. 2744.02.

3. EMPLOYEE. R.C. 2744.01.

4. NEGLIGENCE. OJI-CV 401.01.

5. MALICIOUS PURPOSE. "Malicious purpose" means the willful and intentional design to do injury, or the intention or desire to harm another, usually seriously through unlawful or unjustified conduct.

COMMENT

Drawn from *Afjeh v. Vill. of Ottawa Hills*, 6th Dist. Lucas No. L-14-1267, 2015-Ohio-3483.

6. BAD FAITH. "Bad faith" means a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive, or ill will partaking of the nature of fraud.

COMMENT

Drawn from *Afjeh v. Vill. of Ottawa Hills*, 6th Dist. Lucas No. L-14-1267, 2015-Ohio-3483.

7. WANTON MISCONDUCT. "Wanton misconduct" means the failure to exercise

any care toward those to whom a duty of care is owed in circumstances in which there is a great probability that harm will result.

COMMENT

Drawn from *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711.

8. RECKLESS CONDUCT. "Reckless conduct" means conduct characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct.

COMMENT

Drawn from *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711.

9. SCOPE OF EMPLOYMENT. Conduct is within the "scope of employment" if it is initiated in part to further or promote the employer's business. An employee's wrongful act, even if it is unnecessary, unjustified, excessive, or improper, does not automatically take the act manifestly outside the scope of employment. To be outside the scope of employment, an act must be so divergent that it severs the employer-employee relationship.

COMMENT

Drawn from *Afjeh v. Vill. of Ottawa Hills*, 6th Dist. Lucas No. L-14-1267, 2015-Ohio-3483.

CV 425.13 Statute of limitations R.C. 2744.04

CV 425.15 Damages OJI-CV Chapter 315

COMMENT

R.C. 2744.05 provides limitations on damages. This section applies to all cases which arose on or after November 20, 1985, and to some cases which arose prior thereto.

(Text continued on page 325)

Chapter CV 427

WORKERS' COMPENSATION R.C. 4123.01 *et seq.*

CV 427.01 Workers' compensation *[Rev. 8/5/15]*

CV 427.01 Workers' compensation *[Rev. 8/5/15]*

1. GENERAL. The Workers' Compensation Law of Ohio provides that employees who (were injured) ([contracted] [acquired] occupational diseases or conditions) in the course of and arising out of their employment are entitled to (participate) (continue to participate) in the workers' compensation fund.

The plaintiff, (*insert name of employee*), claims that he/she is entitled to (participate) (continue to participate) in the workers' compensation fund because of (*specify injury, condition, or occupational disease*). The defendant(s), (*insert name of defendant[s]*), (deny) (denies) that the plaintiff is entitled to (participate) (continue to participate) in the workers' compensation fund.

COMMENT

Drawn from R.C. 4123.512(D); *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 2005-Ohio-3560.

2. PROOF OF CLAIM. Before you can find that the plaintiff is entitled to (participate) (continue to participate) in the workers' compensation fund, you must find by the greater weight of the evidence all of the following elements:

(*Use appropriate alternative[s]*)

(A) PHYSICAL INJURY, CONDITION, OR OCCUPATIONAL DISEASE.

(1) The plaintiff was an employee of the defendant employer on (*insert date[s]*);

(2) the plaintiff (suffered an injury) (developed a condition) ([contracted] [developed] an occupational disease);

(3) the plaintiff's (injury) (condition) (occupational disease) arose out of and in the course of his/her employment with the defendant employer; and

(4) the (harm) (disability) the plaintiff suffered was proximately caused by the plaintiff's (injury) (condition) (occupational disease).

COMMENT

In order to demonstrate that an employee contracted an occupational disease while in the course of employment, the employee must prove that the occupational disease proximately resulted from the employment. *See State ex rel. Ohio Bell Tel. Co. v. Krise*, 42 Ohio St.2d 247 (1975); *Hutchinson v. Ohio Ferro Alloys Corp.*, 70 Ohio St.3d 50 (1994).

In *Bennett v. Adm'r., Ohio Bur. of Workers' Comp.*, 134 Ohio St.3d 329, 2012-Ohio-5639, ¶ 18, the Court held that "to establish the right to participate in the fund, a claimant has always had to show by a preponderance of the evidence both that the injury arose out of and in the course of employment and that a proximate causal relationship existed between the injury and the harm or disability."

(*or*)

(B) PSYCHOLOGICAL OR PSYCHIATRIC CONDITION.

(1) The plaintiff was an employee of the defendant employer on (*insert date[s]*);

(2) the plaintiff (suffered an injury) (developed a condition) ([contracted] [developed] an occupational disease);

(3) the plaintiff's (injury) (condition) (occupational disease) arose out of and in the course of his/her employment with the defendant employer;

(4) the plaintiff (suffered) (suffers from) a (psychological) (psychiatric) condition; and

(5) the (psychological) (psychiatric) condition the plaintiff (suffered) (suffers from) was proximately caused by the plaintiff's (injury) (condition) (occupational disease).

COMMENT

Psychological or psychiatric conditions that do not arise from a compensable physical injury or occupational disease are excluded from the definition of "injury" found in R.C. 4123.01(C)(1) and, therefore, from worker's compensation coverage. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505.

In *Jones v. Catholic Healthcare Partners, Inc.*, 7th Dist. Mahoning No. 11 MA 23, 2012-Ohio-6269, the court held that in order for a psychological condition (PTSD) to be compensable, it had to be proximately caused by a compensable injury sustained during the same incident.

3. EMPLOYEE. R.C. 4123.01.

4. EMPLOYER. R.C. 4123.01.

5. INJURY. "Injury" means any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment.

COMMENT

Drawn from R.C. 4123.01. R.C. 4123.01 also defines what "injury" does not include. See also R.C. 4123.54(A)(1) and (2), which exclude an injury that has occurred or occupational disease contracted as a result of being "purposely self-inflicted, or caused by the employee "being intoxicated or under the influence of a controlled substance not prescribed by a physician."

6. INJURY-SPECIAL CIRCUMSTANCES (ADDITIONAL).

(*Use appropriate alternative[s]*)

(A) "Injury" includes physical harm that is accidental and the result of an external means that is a sudden mishap, occurring by chance, unexpected, and not in the usual course of events;

COMMENT

Drawn from *Dripps v. Indus. Comm.*, 165 Ohio St. 407 (1956), *overruled in part by Village v. Gen. Motors Corp., G.M.A.D.*, 15 Ohio St.3d 129 (1984) (expanding the universe of compensable injuries to include those developed gradually over a period of time).

(*or*)

(B) "Injury" includes physical harm that develops gradually over time as the result of the injured employee's performance of job-related duties;

COMMENT

Drawn from *Village v. Gen. Motors Corp., G.M.A.D.*, 15 Ohio St.3d 129 (1984). Note that an "injury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body" is specifically excluded from "injury" by R.C. 4123.01.

(*or*)

(C) "Injury" includes physical harm caused solely by mental or emotional stress greater than that to which all workers are occasionally subjected;

COMMENT

Drawn from *Ryan v. Connor*, 28 Ohio St.3d 406 (1986).

(*or*)

(D) "Injury" includes physical harm caused by an unforeseen, unexpected, and unusual event, even though the worker was doing what he/she intended to do in his/her job and no (outside) (external) force caused the harm.

COMMENT

Drawn from *Malone v. Indus. Comm. of Ohio*, 140 Ohio St. 292 (1942), *overruled on other grounds by Village v. Gen. Motors Corp., G.M.A.D.*, 15 Ohio St.3d 129 (1984).

7. ACCIDENTAL. "Accidental" means both "accidental in character" and "accidental in result." An event is "accidental in character" when, under the circumstances, the fact that it happened was not intended and the event was unusual and unexpected. An event is "accidental in result" when the act that led to the physical harm was intended and expected but the resulting physical harm was unforeseen, unusual, and unexpected.

COMMENT

Drawn from *Malone v. Indus. Comm. of Ohio*, 140 Ohio St. 292 (1942), *overruled on other grounds by Village v. Gen. Motors Corp., G.M.A.D.*, 15 Ohio St.3d 129 (1984).

8. OCCUPATIONAL DISEASE.

(*Use appropriate alternative[s]*)

(A) SCHEDULED. (*Insert name of occupational disease*) is an occupational disease.

COMMENT

If a disease is listed in the schedule found in R.C. 4123.68, it is an "occupational disease" as a matter of law. The plaintiff must prove that it arose out of and in the course of employment.

(*or*)

(B) NONSCHEDULED. "Occupational disease" means a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation, or the condition of the employment, results in a hazard that distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner than the public in general.

The plaintiff must prove by the greater weight of the evidence that

(1) the disease (was contracted) (developed) in the course of employment;

(2) the disease is peculiar to the plaintiff's employment by its causes and the characteristics of its manifestation, or the conditions of the employment result in a hazard that distinguishes the employment in character from employment generally; and

(3) the employment creates a risk of (contracting) (developing) the disease to a greater degree and in a different manner than in the public generally.

COMMENT

Drawn from *State ex rel. Ohio Bell Tel. Co. v. Krise*, 42 Ohio St.2d 247 (1975).

Drawn from R.C. 4123.01. R.C. 4123.68 includes a schedule of occupational diseases that are compensable when contracted by an employee in the course of employment. A disease that meets the definition of an occupational disease is compensable though not specifically listed in the schedule. *Hutchinson v. Ohio Ferro Alloys Corp.*, 70 Ohio St.3d 50, 1994-Ohio-332.

9. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT. The "arising out of" element contemplates a causal connection between the (injury suffered) (condition developed) (occupational disease contracted) and the employment. The phrase "in the course of" relates to the time, place, and circumstances of the (injury suffered) (condition developed) (occupational disease contracted).

COMMENT

The doctrine of dual intent or dual purpose is not recognized for purposes of determining eligibility for workers' compensation benefits in Ohio. *Friebel v. Visiting Nurse Ass'n of Mid-Ohio*, 142 Ohio St.3d 425, 2014-Ohio-4531. The proper way to analyze workers' compensation claims, even for employees traveling for both personal and employment purposes, is to apply the "in the course of" and "arising out of" tests described in *Fisher v. Mayfield*, 49 Ohio St.3d 275 (1990), including the totality-of-the-circumstances tests for causation described in *Lord v. Daugherty*, 66 Ohio St.2d 441 (1981), and *Ruckman v. Cubby Drilling, Inc.*, 81 Ohio St.3d 117 (1998). The employees' subjective intent regarding the purpose of the travel is not determinative as to whether the injury occurred in the

course of or arose out of the employment.

10. CAUSAL CONNECTION. A "causal connection" between an employee's claim and his/her employment depends on the totality of the facts and circumstances, including: (1) the proximity of the scene of the accident to the place of employment; (2) the degree of control the employer had over the scene; and (3) the benefit the employer received from the injured employee's presence at the scene.

COMMENT

Drawn from *Fisher v. Mayfield*, 49 Ohio St. 3d 275 (1990).

11. DEVIATION. An employee who (deviates) (departs) from his/her employment and is injured during the (deviation) (departure) may not participate in the workers' compensation fund. An employee (deviates) (departs) from and is not in the course of his/her employment when the employee pursues personal and private business unrelated to the duties that he/she was hired to perform.

COMMENT

Ruddy v. Indus. Comm.,153 Ohio St. 475 (1950); *Talbott v. Conner*, 4th Dist. Meigs No. 386, 1986 Ohio App. LEXIS 10001 (Feb. 27, 1986).

12. FIXED SITE (COMING-AND-GOING RULE). Generally, the "coming-and-going rule" prohibits an employee who works at a fixed site and who is injured while traveling to or from work from participating in the workers' compensation fund. But an employee who is injured while traveling to or from a fixed work site may still be entitled to participate if: (1) the injury occurs within the "zone of employment"; (2) the employment creates a "special hazard"; or (3) if the totality of the circumstances demonstrates that a causal connection exists between the employee's injury and the employee's work.

COMMENT

MTD Prods., Inc. v. Robatin, 61 Ohio St.3d 66 (1991); *Ruckman v. Cubby Drilling*, 81 Ohio St.3d 117, 1998-Ohio-455.

13. ZONE OF EMPLOYMENT. The "zone of employment" is the place of employment and surrounding areas under the control of the employer. The "zone of employment" includes employer-controlled areas such as parking lots and driveways. It does not include public streets and highways.

COMMENT

Drawn from *Marlow v. The Goodyear Tire & Rubber Co.*, 10 Ohio St.2d 18 (1967); *Ruckman v. Cubby Drilling*, 81 Ohio St.3d 117, 1998-Ohio-455.

14. SPECIAL HAZARD. A fixed-site employee is entitled to participate in the workers' compensation fund for injuries occurring while coming to and going from his/her place of employment when (1) but for the employment, the employee would not have been at the location where the injury occurred; (2) the travel creates a risk that is distinctive in nature from or quantitatively greater than risks common to the public; and (3) the travel serves a function of the employer's business.

COMMENT

Littlefield v. Pillsbury Co., 6 Ohio St.3d 389 (1983), *overruled on other grounds by MTD Products, Inc. v. Robatin*, 61 Ohio St.3d 66 (1991) (holding that the *Littlefield* Court incorrectly applied the law to the facts); *Ruckman v. Cubby Drilling*, 81 Ohio St.3d 117, 1998-Ohio-455 (a "fixed-situs" employee injured in a traffic accident while coming to or going from work must also demonstrate a causal connection between employment and the injury to satisfy the "special-hazard" rule).

15. TOTALITY OF THE CIRCUMSTANCES. The "totality of the circumstances" includes (1) the proximity of the scene of the accident to the place of employment; (2) the degree of control the employer had over the scene of the accident; and (3) the benefit the employer received from the injured employee's presence at the scene of the accident.

COMMENT

Ruckman v. Cubby Drilling, 81 Ohio St.3d 117, 1998-Ohio-455. This list of factors is not exclusive.

16. NO FIXED OR SEMI-FIXED SITE. The "coming-and-going" rule does not apply where the employee's travel to and from home was an integral part of the contract between the employee and the employer, making the risk of accident during travel a risk interrelated with the nature of the employment.

COMMENT

Drawn from *Fletcher v. N.W. Mechanical Contrs., Inc.*, 75 Ohio App.3d 466 (6th

Dist.1991).

17. AGGRAVATION. Employers take their employees as they find them and assume the risk of having an employee's preexisting condition substantially aggravated by an injury that would not harm an otherwise healthy person.

COMMENT

Drawn from R.C. 4123.01(C)(4).

18. AGGRAVATION OF PREEXISTING CONDITION. If an injury substantially aggravates a preexisting condition, the plaintiff may participate in the workers' compensation fund. Once the preexisting condition has returned to its pre-injury level, the plaintiff is no longer entitled to participate.

COMMENT

Drawn from R.C. 4123.54(G).

R.C. 4123.01(C)(4) and R.C. 4123.54(G) require that a substantial aggravation of a preexisting condition be documented by objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints are evidence of a substantial aggravation but are insufficient alone to prove substantial aggravation. *Pflanz v. Lof*, 1st Dist. Hamilton No. C-100574, 2011-Ohio-2670. It is a question of law as to whether objective evidence exists. If the court finds that objective evidence exists, the jury decides the weight to be given that evidence.

19. ACCELERATION. If the death of (*insert name of decedent*) was due to a preexisting condition and was accelerated by a substantial period of time by the (injury suffered) (condition developed) (occupational disease [contracted] [developed]), then the death was a (direct) (proximate) result of the (injury) (condition) (occupational disease).

COMMENT

Oswald v. Connor, 16 Ohio St.3d 38 (1985); *McKee v. Elec. Auto-Lite Co.*, 168 Ohio St. 77 (1958).

20. SUBSTANTIAL. "Substantial" means considerable, major, or significant, not trifling or small.

COMMENT

Pflanz v. Lof, 1st Dist. Hamilton No. C-100574, 2011-Ohio-2670.

21. PROXIMATE CAUSE. OJI-CV 405.01.

22. ADMINISTRATIVE ACTIVITY (ADDITIONAL). There was (testimony) (discussion) about (activities) (decisions) of the agency administering the fund. You must disregard such (testimony) (discussion) and decide this case solely on the evidence presented to you in this court.

23. AFFIRMATIVE DEFENSES. The employer claims that the plaintiff (*describe affirmative defense*). If the plaintiff has proved his/her case by the greater weight of the evidence, you must then consider whether the defendant proved (*describe affirmative defense*) by the greater weight of the evidence. If the (employer) (defendant) proved its defense, you must find for the (employer) (defendant).

(A) INTOXICATION. An injury does not arise out of employment when the injury occurred while the employee was so intoxicated that he/she could not perform his/her job or service.

COMMENT

R.C. 4123.54(A)(2); *Phelps v. Positive Action Tool, Co.*, 26 Ohio St.3d 142 (1986).

(B) UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE. No employee who (is injured) (develops a condition) (contracts an occupational disease) is entitled to benefits if the fact that he/she was under the influence of a controlled substance that was not provided by a physician was the proximate cause of the (injury) (occupational disease) (condition).

COMMENT

R.C. 4123.54(A)(2); R.C. 3719.011.

(1) CHEMICAL TEST RESULT/REFUSAL TO SUBMIT TO TEST. When an employer has posted written notice to employees that the results of, or the employee's refusal to submit to, any chemical test may affect the employee's eligibility to participate in the workers' compensation fund, there is a rebuttable presumption that the employee was intoxicated or under the influence of a controlled substance that was not prescribed by the employee's physician and that being intoxicated or under the influence of a controlled substance that was not

prescribed by the employee's physician was the proximate cause of the injur(y)(ies).

(*Use appropriate alternative*)

(a) In this case, the employee submitted to a chemical test, the results of which demonstrated that he/she had a statutorily prohibited amount of (*insert substance[s]*) in his/her system.

(*or*)

(b) In this case, the employee was given written notice that the refusal to submit to a chemical test may affect his/her eligibility to participate in the workers' compensation fund. Knowing that, the employee refused to submit to the chemical test.

COMMENT

Drawn from R.C. 4123.54(B). The court will read only the portion of the instruction that is appropriate under the circumstances. If the employee submitted to a chemical test, whether the results satisfy the statutory requirements to apply the rebuttable presumption that the employee was intoxicated or under the influence is a matter of law for the court to decide.

(C) PURPOSELY SELF-INFLICTED. A person acts purposely when it is his/her specific intention to cause a certain result.

COMMENT

Drawn from R.C. 4123.54(A)(1); R.C. 2901.22(A).

24. CONCLUSION, VERDICT, AND CLOSING.

(A) GENERAL. The issue you must decide is whether (*insert name of employee*) is entitled to (participate) (continue to participate) in the workers' compensation fund. If you find that (*insert name of employee*) is entitled to (participate) (continue to participate), you will not consider any amount of compensation.

(B) FOR PLAINTIFF. If you find that (*insert name of employee*) has proved by the greater weight of the evidence all the elements of his/her case, then your verdict must be that he/she is entitled to (participate) (continue to participate) in the workers' compensation fund.

(C) FOR EMPLOYER. If you find that (*insert name of employee*) has failed to prove by the greater weight of the evidence any element of his/her case, or if you find that the evidence is evenly balanced on any element, then your verdict must be that he/she is not entitled to (participate) (continue to participate) in the workers' compensation fund.

(D) VERDICT FORM. We, the jury, find that (*insert name of employee*) (IS) (IS NOT) entitled to (participate) (continue to participate) in the workers' compensation fund.

(Strike out either IS or IS NOT.)

_____ _____

_____ _____

_____ _____

_____ _____

Chapter CV 429

ASSAULT, BATTERY, INFLICTION OF SERIOUS EMOTIONAL DISTRESS

CV 429.01	Civil assault *[Rev. 8-16-06]*
CV 429.03	Battery *[Rev. 8-16-06]*
CV 429.05	Intentional infliction of serious emotional distress *[Rev. 12-11-05]*
CV 429.07	Negligent infliction of serious emotional distress
CV 429.09	Intentional tort claims, allocation of damages, multiple defendants, interrogatories required (claims arising on and after 4/9/03) *[Rev. 10-11-08]*
CV 429.11	Intentional tort with other tortious conduct claims, allocation of damages, multiple defendants, interrogatories required (claims arising on and after 4/9/03) *[Rev. 10-11-08]*

CV 429.01 Civil assault *[Rev. 8-16-06]*

1. CIVIL ASSAULT. An assault is the intentional offer or attempt, without authority or consent, to harm or offensively touch another that reasonably places the other in fear of such contact.

Words alone do not constitute assault, but must be coupled with some definite act by one with apparent ability to carry out the offensive act.

2. BURDEN OF PROOF. OJI-CV 303.03.

3. PREPONDERANCE. OJI-CV 303.05.

4. PROXIMATE CAUSE. OJI-CV 405.01 §§ 2, 3.

5. COMPENSATORY DAMAGES, GENERAL AND SPECIAL. OJI-CV Chapter 315.

6. INTERROGATORIES. OJI-CV 429.09, OJI-CV 429.11.

COMMENT

These interrogatories are required in cases involving multiple defendants or claims of non-party liability.

7. PUNITIVE DAMAGES. OJI-CV 315.37.

8. AFFIRMATIVE DEFENSES. Examples: privilege, consent, self-defense and justification.

COMMENT

OJI-CV 303.03 § 4.

Civil assault is to be distinguished from criminal assault, R.C. 2903.13 and negligent assault, R.C. 2903.14. The essence of civil assault is the plaintiff's apprehension of harm, whether or not the actor actually has the ability to inflict the physical contact or threatened bodily harm. Without apprehension of harm there is no assault. *Ryan v. Conover* (1937), 59 Ohio App. 361, 363, and apprehension is a subjective matter. Restatement, Second, Torts, § 27. The possible defenses to civil assault and civil battery are very similar. Defenses may include defenses of third persons' property or person, regaining of property of one or another, aggression of plaintiff by threats, abuse or hostile attitude. Provocation may be shown to mitigate punitive damages. For self-defense, see OJI-CR 421.19, OJI-CR 421.21, and OJI-CR 421.23.

CV 429.03 Battery *[Rev. 8-16-06]*

1. BATTERY. Battery is intentional, unconsented, contact with another.

COMMENT

Contact with another may include contact with his/her clothing or objects held by him/her. A battery may occur without actual physical harm.

An action for battery will not lie if the plaintiff expressly or impliedly consents to a lawful act resulting in the bodily contact, unless the act is different in nature or degree from the consented to intrusion, e.g., a friendly tussle is not consent to mayhem, or consent to an operation on a foot is not consent to amputate the leg. One cannot consent to an unlawful act, e.g., statutory rape.

Consent means acquiescence to the touching, with sufficient knowledge and understanding. *Belcher v. Carter* (1967), 13 Ohio App.2d 113. See OJI-CV 417.05.

2. PROXIMATE CAUSE. OJI-CV 405.01 §§ 2, 3.

3. COMPENSATORY DAMAGES, NOMINAL, GENERAL AND SPECIAL. OJI-CV 315.01 et seq.

4. INTERROGATORIES. OJI-CV 429.09, OJI-CV 429.11.

COMMENT

These interrogatories are required in cases involving multiple defendants or claims of non-party liability.

5. PUNITIVE DAMAGES. OJI-CV 315.37.

6. AFFIRMATIVE DEFENSES. Examples: privilege, consent, self-defense and justification.

COMMENT

OJI-CV 303.03 § 4. For self-defense, see OJI-CR 421.19, OJI-CR 421.21, and OJI-CR 421.23.

CV 429.05 Intentional infliction of serious emotional distress *[Rev. 12-11-05]*

COMMENT

For negligent infliction of serious emotional distress see OJI-CV 429.07.

1. (A) DEFINITION. Whenever an individual intentionally or recklessly acts in an extreme and outrageous manner so as to cause serious emotional distress to another, he may be held liable for any mental or physical injury caused.

COMMENT

Yeager v. Local Union 20 (1983), 6 Ohio St.3d 369; *Reamsnyder v. Jaskolski* (1984), 10 Ohio St.3d 150.

(B) ADDITIONAL. Liability exists only where the (conduct) (acts) (is) (are) so outrageous in character and so extreme in degree, that (it) (they) (goes) (go) beyond all possible bounds of decency and may be regarded as atrocious and utterly intolerable in a civilized community.

(C) MERE INSULTS. Mere (insults) (indignities) (threats) (annoyances) (petty oppressions) are not enough. All people (plaintiffs) are (expected) (required) to be hardened to a certain amount of rough language or acts which are inconsiderate or unkind. The law does not intervene in every case where feelings are hurt and there is still freedom to express an unflattering opinion.

2. ELEMENTS. In order to recover the plaintiff must prove by the greater weight of the evidence three elements:

(1) That the defendant intentionally or recklessly acted in an extreme and outrageous manner.

(2) That defendant's actions proximately caused plaintiff's psychic (and) physical injuries.

(3) That plaintiff's mental anguish was serious and of a nature that no reasonable man could be expected to endure.

3. INTEND (INTENT). A person acts intentionally when he has the (purpose) (conscious objective) to produce a specific result. A person intends an act when it is done purposely, not accidentally. The intent with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.

4. RECKLESSLY. A person acts recklessly when with heedless indifference to the consequences he perversely disregards a known risk that his conduct is likely to cause serious emotional distress.

5. EXTREME AND OUTRAGEOUS. An act is extreme and outrageous when it passes all reasonable bounds of decency and is excessive, wanton, or gross.

6. SERIOUS.

(A) The emotional distress or mental anguish must be serious. A reasonable person, of normal mental condition, would be unable to (contend with) (face) satisfactorily a serious (mental anguish) (emotional distress).

(B) ADDITIONAL. The law cannot provide damages or protect against all mental anguish. People are required to (endure) (suffer) some emotional discomfort. To recover the plaintiff must prove by the greater weight of the evidence that the distress is serious.

7. DAMAGES. OJI-CV 315.01 et seq.

COMMENT

Be sure to include words which cover mental and emotional as well as physical health.

8. INTERROGATORIES. OJI-CV 429.09, OJI-CV 429.11.

COMMENT

These interrogatories are required in cases involving multiple defendants or claims of non-party liability.

9. PUNITIVE DAMAGES. OJI-CV 315.37.

10. CONCLUSION. OJI-CV Chapter 313.

COMMENT

This is an intentional tort. Remove words "of negligence" from conclusory paragraphs.

CV 429.07 Negligent infliction of serious emotional distress

COMMENT

Whether the emotional distress was serious enough to allow recovery is first for the court to decide as a matter of law. *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 6 Ohio B. 114, 451 N.E.2d 759.

"The *Paugh* standard creates a two-tier determination that is not otherwise applicable in the determination of mental damages to a person who is actually involved in the accident. The court first determines as a matter of law whether there was proof of emotional distress that was more than trifling, mere upset, or hurt feelings. Then the jury is instructed to find whether the emotional distress actually suffered reached the level of serious or debilitating emotional distress." *Binns v. Fredendall* (1987), 32 Ohio St.3d 244, 245, n. 1, 513 N.E.2d 278, 280, n. 1.

Whether the harm was foreseeable is also first to be decided by the court on a case by case basis, analyzing all the circumstances, excluding the remote and unexpected. *Burris v. Grange Mutual Cos.* (1989), 46 Ohio St.3d 84, 92, 545 N.E.2d 83.

The claim for negligent infliction of emotional distress should not be confused with claims for emotional and psychic injuries sustained contemporaneously with a physical injury as such emotional distress need not be severe or debilitating. *Binns v. Fredendall,* supra.

1. GENERAL. To recover for negligent infliction of serious emotional distress, plaintiff must prove by the greater weight of the evidence that:

(A) The defendant was negligent;

(B) The plaintiff suffered serious emotional distress;

(C) The serious emotional distress was the direct result of the negligence of the defendant;

(D) The serious emotional distress of the plaintiff was reasonably foreseeable by the defendant at the time of the alleged negligence.

COMMENT

Schultz v. Barberton Glass Company (1983), 4 Ohio St.3d 131, 447 N.E.2d 109.

2. NEGLIGENCE. OJI-CV 401.01.

3. SERIOUS EMOTIONAL DISTRESS. Serious emotional distress describes injury which is both severe and debilitating. It does not extend to mere insults, indignities, threats, annoyances, petty oppression or mere trivialities. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress caused by the circumstances of the case. It is mental anguish of a nature that no reasonable person could be expected to endure. You may consider any evidence of a resulting physical (impairment) (condition) in judging the degree of emotional distress suffered.

COMMENT

Reamsnyder v. Jaskolski (1984), 10 Ohio St.3d 150, 462 N.E.2d 392; *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 453 N.E.2d 666; *Paugh v. Hanks*, *supra*; *Pyle v. Pyle* (1983), 11 Ohio App.3d 31, 463 N.E.2d 98 (intentional act).

4. REASONABLY FORESEEABLE. In determining whether serious emotional distress was reasonably foreseeable by defendant you should consider all of the circumstances of the parties existing at the time of the alleged negligence of the defendant.

COMMENT

No one standard charge will be applicable to all cases. For factors to be considered see *Paugh v. Hanks*, *supra*, syllabus 3b. For examples see *Pyle v. Pyle*, *supra*; *Carney v. Knollwood Cemetery Assn.* (1986), 33 Ohio App.3d 31, 514 N.E.2d 430 (mishandling of dead body); *Molien v. Kaiser Foundation Hospitals* (1980), 167 Cal. Rptr. 831, 616 P.2d 813 (misdiagnosis of syphilis); *Bass v. Nooney* (1983 Missouri), 646 S.W.2d 765 (one trapped in an elevator);

Prosser and Keeton, The Law of Torts (5th ed. 1984) 361, Sec. 54; and OJI-CV 401.07.

5. BURDEN OF PROOF. OJI-CV 303.03.

6. PROXIMATE CAUSE. OJI-CV 405.01.

7. DAMAGES. OJI-CV Chapter 315.

8. CONCLUSIONS. OJI-CV Chapter 313.

CV 429.09 Intentional tort claims, allocation of damages, multiple defendants, interrogatories required (claims arising on and after 4/9/03) *[Rev. 10-11-08]*

COMMENT

R.C. 2307.011(D) defines an intentional tort claim as one alleging "that a tortfeasor intentionally caused or intentionally contributed to the injury or loss to person or property or the wrongful death or that a tortfeasor knew or believed that the injury or loss to person or property or the wrongful death was substantially certain to result from the tortfeasor's conduct." The Committee believes that the legislature did not intend to modify the elements of any common law intentional tort.

R.C. 2307.22 and 2307.23 allocate damages based on the intentional conduct of multiple actors, as defined in R.C. 2307.011(D).

S.B. 120 provides that tortious conduct of other responsible parties or persons can reduce the damages available to a plaintiff who otherwise meets the burden of proof and persuasion. R.C. 2307.22 and 2307.23. The judge must identify every potentially liable person.

The interrogatories are designed for cases in which there is only one plaintiff, and all defendants are alleged to have acted intentionally. If there is more than one plaintiff, a separate set of interrogatories should be used for each plaintiff. If more than two responsible persons are involved, the interrogatories will have to be expanded.

1. INTRODUCTION TO INTERROGATORIES. You will be given written questions called interrogatories. You must answer them in writing, starting with the first question. You must follow carefully the directions about how to proceed, because the directions will tell you which of you may participate as well as what questions to answer and whether to sign the general verdict for the plaintiff or for the defendant. A question is answered when at least (six) (three-fourths) of the jurors agree. All who agree must sign. If (six) (three-fourths) jurors cannot agree on an answer, you will be instructed to report to the court.

COMMENT

The Committee believes that the same juror rule expressed in *O'Connell v. Chesapeake & Ohio RR. Co.*(1991), 58 Ohio St.3d 226, syllabus, applies to apportionment of damages in intentional tort cases.

2. INTERROGATORIES.

(A) DID (*insert name of defendant 1*) (*identify intentional tort with respect to plaintiff*)?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more jurors to (A) is "yes," move to Interrogatory (B). In answering the following Interrogatory (B) about whether the defendant's conduct was a direct and proximate cause of the plaintiff's (injury)(damages), only those jurors who answered "yes" to Interrogatory (A) are qualified to participate in answering Interrogatory (B).

COMMENT

Ohio follows the "same juror" rule. *O'Connell v. Chesapeake and Ohio Railroad* (1991), 58 Ohio St.3d 226.

(2) If the answer of (six) (three-fourths) or more jurors to (A) is "no,"

(a) sign the general verdict for (*insert name of defendant 1*), and

(b) move to interrogatory (C).

(3) If six jurors cannot agree on an answer to Interrogatory (A), report this to the court.

(B) WAS THE (*identify intentional tort*) COMMITTED BY (*insert name of defendant 1*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____

_____ _____

(1) If the answer of (six) (three-fourths) or more jurors to (B) is "yes," move to Interrogatory (C) and all jurors may participate.

(2) If the answer of (six) (three-fourths) or more jurors to (B) is "no,"

(a) sign the general verdict for (*insert name of defendant 1*),

(b) move to Interrogatory (C) and all jurors may participate.

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (B), report this to the court.

(C) DID (*insert name of defendant 2*) (*identify intentional tort with respect to plaintiff*).

CIRCLE YOUR ANSWER IN INK	YES or NO

(1) If the answer of (six) (three-fourths) or more jurors to (C) is "yes," move to Interrogatory (D) and only those jurors who answered "yes" to (C) may participate.

(2) If the answer of (six) (three-fourths) or more jurors to (C) is "no," sign the general verdict for (*insert name of defendant 2*).

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (C), report this to the court.

(D) WAS THE (*identify intentional tort*) COMMITTED BY (*insert name of Defendant 2*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY)(DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO

(1) If the answer of (six) (three-fourths) or more jurors to (D) is "yes," move to Interrogatory (E) and all jurors may participate.

(2) If the answer of (six) (three-fourths) or more jurors to (D) is "no," sign the general verdict for (*insert name of defendant 2*).

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (D), report this to the court.

(E) (WAS [*insert identity of non-party*] NEGLIGENT?) (DID [*insert identity of non-party*] [*describe other tortious conduct*]?)

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more jurors to (E) is "yes," move to Interrogatory (F). In answering the following Interrogatory (F) about whether the conduct of (*insert identity of non-party*) was a direct and proximate cause of the plaintiff's (injury) (damages), only those jurors who answered "yes" to Interrogatory (E) are qualified to participate in answering Interrogatory (F).

(2) If the answer of (six) (three-fourths) or more jurors to (E) is "no," move to Interrogatory (G).

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (E), report this to the court.

(F) WAS THE (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more jurors to (F) is "yes" or "no," move to Interrogatory (G).

(2) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (F), report this to the court.

(G) In answering the following Interrogatory (G) about the percentages of (*describe tortious conduct*) that was a direct and proximate cause of the plaintiff's (injury) (damages), please observe the following:

(1) For each (non party) (person who was not sued) who proximately caused the Plaintiff's (injury) (damages) state the percentage of (*describe all tortious conduct that caused the plaintiff's [injuries] [damages]*) attributable to that person.

(2) For each defendant whose (*describe tortious conduct*) proximately caused the plaintiff's (injury) (damages) state the percentage of (*describe all tortious*

conduct that proximately caused the plaintiff's [injury] [damages]) attributable to that person.

(3) ENTER PERCENTAGES.

(a) PERCENTAGE OF (*describe all tortious conduct*) ATTRIBUTABLE TO: *(insert name of defendant 1, if applicable)*:

_____%

(b) PERCENTAGE OF (*describe all tortious conduct*) ATTRIBUTABLE TO *(insert name of defendant 2, if applicable)*: _____%

(c) PERCENTAGE OF (NEGLIGENCE) (*describe other tortious conduct*) ATTRIBUTABLE TO THE FOLLOWING PERSON (*identity non-party*):

_____%

COMMENT

The judge must identify every potentially liable person. This interrogatory must be modified to include every potentially liable party and non-party.

(d) The percentages attributable to defendant(s) and other person(s) must equal the total of:

100%

_____ _____

_____ _____

_____ _____

_____ _____

(4) If (six) (three-fourths) jurors cannot agree on an answer to interrogatory (G) report this to the court.

(5) When (six) (three-fourths) jurors have agreed on an answer to interrogatory (G):

(a) move to Interrogatory (H), and all the jurors shall participate in the deliberations, and

(b) sign the general verdict for the plaintiff.

(H) STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES TO THE PLAINTIFF.

STATE YOUR ANSWER IN FIGURES IN INK $_____

_____ _____

_____ _____
_____ _____
_____ _____

COMMENT

The Committee believes that since the issues relating to damages are analytically different from those relating to liability, the determination of damages may be made by all jurors.

(I) PLEASE STATE THE FOLLOWING:

(1) THE PORTION OF THE COMPENSATORY DAMAGES THAT REPRESENTS ECONOMIC LOSS TO THE PLAINTIFF: $_____

(2) THE PORTION OF THE COMPENSATORY DAMAGES THAT REPRESENTS NON-ECONOMIC LOSS TO THE PLAINTIFF: $_____

(3) THE TOTAL AMOUNT OF THE COMPENSATORY DAMAGES SUSTAINED BY THE PLAINTIFF (TOTAL OF "ECONOMIC" AND "NON-ECONOMIC" LOSS): $_____

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

S.B. 120 requires that the jury distinguish between economic and non-economic damages. The distinction between economic and non-economic damages is significant, as different percentages of each may be recoverable against particular defendants, depending upon the allocation of liability. R.C. 2307.22, 2307.23.

3. COMPENSATORY DAMAGES. "Compensatory damages" include both economic and non-economic loss.

COMMENT

When plaintiff's claim for future damages exceeds $200,000, see introductory comment to OJI-CV 403.05.

4. ECONOMIC LOSS. R.C. 2307.011.

5. NON-ECONOMIC LOSS. R.C. 2307.011.

6. GENERAL VERDICT. OJI-CV 403.01 § 4 (claims arising before 1/5/88).

CV 429.11 Intentional tort with other tortious conduct claims, allocation of damages, multiple defendants, interrogatories required (claims arising on and after 4/9/03) *[Rev. 10-11-08]*

COMMENT

R.C. 2307.011(D) defines an intentional tort claim as one alleging "that a tortfeasor intentionally caused or intentionally contributed to the injury or loss to person or property or the wrongful death or that a tortfeasor knew or believed that the injury or loss to person or property or the wrongful death was substantially certain to result from the tortfeasor's conduct." The Committee believes that the legislature did not intend to modify the elements of any common law intentional tort.

R.C. 2307.22 and 2307.23 allocate damages based on the intentional conduct of multiple actors, as defined in R.C. 2307.011(D).

S.B. 120 provides that tortious conduct of other responsible parties or persons can reduce the damages available to a plaintiff who otherwise meets the burden of proof and persuasion. R.C. 2307.22 and 2307.23. The judge must identify every potentially liable person.

These interrogatories are designed for cases in which a single plaintiff has alleged an intentional tort against one or more defendants and a non-intentional tort against one or more defendants. If there is more than one plaintiff, a separate set of interrogatories should be used for each.

R.C. 2307.22 and.23 provide for allocation of responsibility/damages based on multiple actors' roles in causing damages by intentional conduct as defined in R.C. 2307.011(D) and/or other tortious conduct.

For employer intentional torts, see OJI-CV 537.05.

1. INTRODUCTION TO INTERROGATORIES. You will be given written questions called interrogatories. You must answer them in writing, starting with the first question. You must follow carefully the directions about how to proceed, because the directions will tell you which of you may participate as well as what questions to answer and whether to sign the general verdict for the plaintiff or for the defendant. A question is answered when at least (six) (three-fourths) of the jurors agree. All who agree must sign. If (six) (three-fourths) jurors cannot agree on an answer, you will be instructed to report to the court.

COMMENT

The Committee believes that the same juror rule expressed in *O'Connell v. Chesapeake & Ohio RR. Co.* (1991), 58 Ohio St.3d 226, syllabus, applies to apportionment of damages in intentional tort cases.

2. INTERROGATORIES.

(A) DID (*insert name of defendant 1*) (*describe non-intentional tortious conduct claimed by plaintiff*)?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more jurors to (A) is "yes," move to Interrogatory (B). In answering the following Interrogatory (B) about whether the defendant's conduct was a direct and proximate cause of the plaintiff's (injury)(damages), only those jurors who answered "yes" to Interrogatory (A) are qualified to participate.

COMMENT

Ohio follows the "same juror" rule. *O'Connell v. Chesapeake and Ohio Railroad* (1991), 58 Ohio St.3d 226.

(2) If the answer of (six) (three-fourths) or more jurors to (A) is "no,"

(a) sign the general verdict for (*insert name of defendant 1*), and

(b) move to Interrogatory (C).

(3) If six jurors cannot agree on an answer to Interrogatory (A), report this to the court.

(B) WAS (*insert name of defendant 1*) (*describe non-intentional tortious conduct claimed by plaintiff*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY)(DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____

_____ _____

(1) If (six) (three-fourths) of the jurors have answered "yes" to Interrogatory (B) move to Interrogatory (C).

(2) If (six) (three-fourths) of the jurors have answered "no" to Interrogatory (B)

(a) sign the general verdict for (*insert name of defendant 1*), and

(b) move to Interrogatory (C).

(3) If *six jurors cannot agree on* an answer to Interrogatory (B), report this to the court.

(C) DID (*insert name of defendant 2*) (*describe intentional tortious conduct claimed by plaintiff*)?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If (six) (three-fourths) of the jurors have answered "yes" to Interrogatory (C), move to Interrogatory (D). In answering the following Interrogatory (D) about whether the defendant's conduct was a direct and proximate cause of the plaintiff's (injury)(damages), only those jurors who answered "yes" to Interrogatory (C) are qualified to participate.

(2) If (six) (three-fourths) of the jurors have answered "no" to Interrogatory (C), sign the verdict for (*insert name of defendant 2*) and move to Interrogatory (E) only if you have answered "yes" to both interrogatories (A) and (B). If you have signed the verdict forms for both (*insert names of defendants 1 and 2*) report this to the court.

(3) If six jurors cannot agree on an answer to Interrogatory (C), report this to the court.

(D) WAS (*insert name of defendant 2*) (*describe intentional tortious conduct claimed by plaintiff*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If (six) (three-fourths) of the jurors have answered "yes" to interrogatories (C) and (D), and you have signed the general verdict for (*insert name of defendant 1*), move to Interrogatory (H).

(2) If (six) (three-fourths) of the jurors have answered "no" to Interrogatory (D), sign the verdict for (*insert name of defendant 2*) and move to Interrogatory (E) only if you have answered "yes" to both interrogatories (A) and (B). If you have signed the verdict forms for both (*insert names of defendants 1 and 2*) report this to the court.

(3) If six jurors cannot agree on an answer to Interrogatory (D), report this to the court.

(E) (WAS THE PLAINTIFF NEGLIGENT?) (DID THE PLAINTIFF IMPLIEDLY ASSUME THE RISK OF INJURY?) (DID THE PLAINTIFF [*DESCRIBE OTHER TORTIOUS CONDUCT*]?)

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of six or more jurors to (E) is "yes," move to Interrogatory (F). In answering the following Interrogatory (F), only those jurors who answered "yes" to Interrogatory (E) are qualified to participate.

(2) If six jurors cannot agree on an answer to Interrogatory (E), report this to the Court.

(3) If the answer of six or more jurors to (E) is "no," and only one defendant remains, sign the general verdict for the plaintiff and move to Interrogatory (H).

(4) If the answer of six or more jurors to (E) is "no," and more than one defendant remains, sign the general verdict for the plaintiff and move to Interrogatory (G).

(F) WAS THE PLAINTIFF'S (NEGLIGENCE) (ASSUMPTION OF THE RISK) (*DESCRIBE TORTIOUS CONDUCT*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of six or more jurors to (F) is "no," and the answer of six or

more jurors to both (A) and (B) is "yes," and the answer to either (C) or (D) is "no," sign the general verdict for the plaintiff and move to Interrogatory (H).

(2) If the answer of six or more jurors to (F) is "no," and the answer of six or more jurors to either (A) or (B) is "no," and the answer to both (C) and (D) is "yes," sign the general verdict for the plaintiff and move to Interrogatory (H).

(G) (WAS [*insert identity of non-party*] NEGLIGENT?) (DID [*insert identity of non-party*] [*describe other tortious conduct*]?)

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more jurors to (G) is "yes," move to Interrogatory (H). In answering the following Interrogatory (H) about whether the conduct of (*insert identity of non-party*) was a direct and proximate cause of the plaintiff's (injury) (damages), only those jurors who answered "yes" to Interrogatory (G) are qualified to participate.

(2) If the answer of (six) (three-fourths) or more jurors to (G) is "no," move to Interrogatory (I).

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (G), report this to the court.

(H) WAS THE (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*) A DIRECT AND PROXIMATE CAUSE OF ANY (INJURY) (DAMAGES) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (H), report this to the court.

(2) If the answer of (six) (three-fourths) or more jurors to (H) is "yes" or "no," move to Interrogatory (I). In answering the following Interrogatory (I) about the percentages of conduct that was a direct and proximate cause of the plaintiff's (injury) (damages), select one of the following alternatives:

(a) PLAINTIFF, (*insert name of defendant 1*), (*insert name of defendant 2*), AND (*insert identity of non-party*) ALL RESPONSIBLE FOR PLAINTIFF'S

INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), (D), (E), (F), (G), and (H) move to Interrogatory (I)(1). Only those jurors who answered "yes" to all eight Interrogatories (A), (B), (C), (D), (E), (F), (G), and (H) are qualified to participate in answering Interrogatory (I)(1).

(b) PLAINTIFF, (*insert name of defendant 1*), AND (*insert name of defendant 2*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), (D), (E), and (F) move to Interrogatory (I)(2). Only those jurors who answered "yes" to Interrogatories (A), (B), (C), (D), (E), and (F) are qualified to participate in answering Interrogatory (I)(2).

(c) ONLY PLAINTIFF AND (*insert name of defendant 1*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (E), and (F) move to Interrogatory (I)(3). Only those jurors who answered "yes" to Interrogatories (A), (B), (E), and (F) are qualified to participate in answering Interrogatory (I)(3).

(d) ONLY (*insert name of defendant 1*), (*insert name of defendant 2*), AND (*insert identity of non-party*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), (D), (G), and (H) move to Interrogatory (I)(4). Only those jurors who answered "yes" to Interrogatories (A), (B), (C), (D), (G), and (H) are qualified to participate in answering Interrogatory (I)(4).

(e) ONLY (*insert name of defendant 1*) AND (*insert name of defendant 2*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), and (D) move to Interrogatory (I)(5). Only those jurors who answered "yes" to Interrogatories (A), (B), (C), and (D) are qualified to participate in answering Interrogatory (I)(5).

(f) ONLY (*insert name of defendant 1*) AND (*insert identity of non-party*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (G), and (H) move to Interrogatory (I)(6). Only those jurors who answered "yes" to Interrogatories (A), (B), (G), and (H) are qualified to participate in answering Interrogatory (I)(6).

(g) ONLY (*insert name of defendant 2*) AND (*insert identity of non-party*) RESPONSIBLE FOR PLAINTIFF'S INJURY. If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (C), (D), (G), and (H) move to Interrogatory (I)(7). Only those jurors who answered "yes" to Interrogatories (C), (D), (G), and (H) are qualified to participate in answering Interrogatory (I)(7).

(h) If less than (six) (three-fourths) jurors are qualified to answer (I)(1), (I)(2),

(I)(3), (I)(4), (I)(5), (I)(6), or (I)(7) report this to the court.

(I)(1) STATE THE PERCENTAGES OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) (*describe other tortious conduct*) OF THE PLAINTIFF, NEGLIGENCE OF (*insert name of defendant 1*), (*describe intentional tortious conduct*) OF (*insert name of defendant 2*) AND (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*) WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES):

(a) ENTER PERCENTAGES.

(i) PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (*describe other tortious conduct*) OF THE PLAINTIFF: _____%

(ii) PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 1*): _____%

(iii) PERCENTAGE OF (*describe intentional tortious conduct*) OF (*insert name of defendant 2*): _____%

(iv) PERCENTAGE OF (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*): _____%

COMMENT

The judge must identify every potentially liable person.

(v) The percentages attributable to plaintiff, defendants, and non-party must equal the total of:

100%

_____ _____

_____ _____

_____ _____

_____ _____

(b) If the percentage attributed to the plaintiff is 50% or less,

(i) move to Interrogatory (J), and all the jurors shall participate in the deliberations, and

(ii) sign the general verdict for the plaintiff.

(c) If the percentage attributable to the plaintiff is greater than 50%,

(i) move to Interrogatory (J), and all the jurors shall participate in the deliberations, and

(ii) sign the general verdicts for (*insert name of defendant 1*).

(d) If (six) (three-fourths) jurors can not agree on an answer to Interrogatory (I)(1) report this to the court.

(I)(2) STATE THE PERCENTAGES OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) (*describe other tortious conduct*) OF THE PLAINTIFF, NEGLIGENCE OF (*insert name of defendant 1*), AND (*describe intentional tortious conduct*) OF (*insert name of defendant 2*) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES):

(a) ENTER PERCENTAGES.

(i) PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (*describe other tortious conduct*) OF THE PLAINTIFF: _____%

(ii) PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 1*): _____%

(iii) PERCENTAGE OF (*describe intentional tortious conduct*) OF (*insert name of defendant 2*): _____%

COMMENT

The judge must identify every potentially liable person.

(iv) The percentages attributable to plaintiff and defendants must equal the total of:

100%

_____ _____

_____ _____

_____ _____

_____ _____

(b) If the percentage attributed to the plaintiff is 50% or less,

(i) move to Interrogatory (J), and all the jurors shall participate in the deliberations, and

(ii) sign the general verdict for the plaintiff.

(c) If the percentage attributable to the plaintiff is greater than 50%,

(i) move to Interrogatory (J), and all the jurors shall participate in the deliberations, and

(ii) sign the general verdicts for the (*insert name of defendant 1*).

(d) If (six) (three-fourths) jurors can not agree on an answer to Interrogatory (I)(2) report this to the court.

(I)(3) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 1*) AND (NEGLIGENCE) (IMPLIED ASSUMPTION OF RISK) (*describe other tortious conduct*) OF THE PLAINTIFF THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES).

(a) ENTER PERCENTAGES.

(i) PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 1*): _____%

(ii) PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (*describe other tortious conduct*) OF THE PLAINTIFF: _____%

(iii) The percentages attributable to plaintiff and (*insert name of defendant 1*) must equal the total of:

100%

_____ _____

_____ _____

_____ _____

_____ _____

(b) If the percentage attributed to the plaintiff is 50% or less,

(i) move to Interrogatory (J), and all the jurors shall participate in the deliberations, and

(ii) sign the general verdict for the plaintiff.

(c) If the percentage attributable to the plaintiff is greater than 50%,

(i) do not sign Interrogatory (J), and

(ii) sign the general verdicts for the (*insert name of defendant 1*), and

(iii) report to the court that you have completed your deliberations.

(d) If (six) (three-fourths) jurors can not agree on an answer to Interrogatory (I)(3) report this to the court.

(I)(4) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 1*) AND INTENTIONAL TORTIOUS CONDUCT OF (*insert name of defendant 2*) AND (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES).

(a) ENTER PERCENTAGES.

(i) PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 1*): _____%

(ii) PERCENTAGE OF INTENTIONAL TORTIOUS CONDUCT OF (*insert name of defendant 2*): _____%

(iii) PERCENTAGE OF (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*): _____%

(iv) The percentages attributable to plaintiff and defendants must equal the total of:

100%

_____ _____
_____ _____
_____ _____
_____ _____

(b) move to Interrogatory (J), and all the jurors shall participate in the deliberations, and sign the general verdict for the plaintiff.

(c) If the percentage attributable to the plaintiff is greater than 50%,

(d) If (six) (three-fourths) jurors can not agree on an answer to Interrogatory (I)(4) report this to the court.

(I)(5) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 1*) AND INTENTIONAL TORTIOUS CONDUCT of (*insert name of defendant 2*) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES).

(a) ENTER PERCENTAGES.

(i) PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 1*): _____%

(ii) PERCENTAGE OF INTENTIONAL TORTIOUS CONDUCT OF (*insert name of defendant 2*): _____%

(iii) The percentages attributable to plaintiff and defendants must equal the total of:

100%

_____ _____
_____ _____
_____ _____
_____ _____

(b) move to Interrogatory (J), and all the jurors shall participate in the deliberations, and

(c) sign the general verdict for the plaintiff.

(d) If (six) (three-fourths) jurors can not agree on an answer to Interrogatory (I)(5) report this to the court.

(I)(6) STATE THE PERCENTAGES OF NEGLIGENCE OF (*insert name of defendant 1*) AND (NEGLIGENCE) (*describe other tortious conduct*) of (*insert identity of non-party*) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES).

(a) ENTER PERCENTAGES.

(i) PERCENTAGE OF NEGLIGENCE OF (*insert name of defendant 1*): _____%

(ii) PERCENTAGE OF (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*): _____%

(iii) The percentages attributable to (*insert name of defendant 1*) and (*insert identity of non-party*) must equal the total of:

100%

_____ _____

_____ _____

_____ _____

_____ _____

(b) move to Interrogatory (J), and all the jurors shall participate in the deliberations, and

(c) sign the general verdict for the plaintiff.

(d) If (six) (three-fourths) jurors can not agree on an answer to Interrogatory (I)(6) report this to the court.

(I)(7) STATE THE PERCENTAGES OF INTENTIONAL TORTIOUS CONDUCT OF (*insert name of defendant 2*) AND (NEGLIGENCE) (*describe other tortious conduct*) of (*insert identity of non-party*) THAT WAS A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DAMAGES).

(a) ENTER PERCENTAGES.

(i) PERCENTAGE OF INTENTIONAL TORTIOUS CONDUCT OF (*insert name of defendant 2*): _____%

(ii) PERCENTAGE OF (NEGLIGENCE) (*describe other tortious conduct*) OF (*insert identity of non-party*): _____%

(iii) The percentages attributable to (*insert name of defendant 2*) and (*insert identity of non-party*) must equal the total of:

100%

_____ _____
_____ _____
_____ _____
_____ _____

(b) move to Interrogatory (J), and all the jurors shall participate in the deliberations, and

(c) sign the general verdict for the plaintiff.

(d) If (six) (three-fourths) jurors can not agree on an answer to Interrogatory (I)(7) report this to the court.

(J) STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES TO THE PLAINTIFF WITHOUT REGARD TO THE PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (OR BOTH) ATTRIBUTED TO THE PLAINTIFF.

STATE YOUR ANSWER IN FIGURES IN INK $_____

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

The Committee believes that since the issues relating to damages are analytically different from those relating to causal negligence, the determination of damages may be made by all jurors without regard to their individual votes on causal negligence.

(K) PLEASE STATE THE FOLLOWING:

(1) THE PORTION OF THE COMPENSATORY DAMAGES THAT REPRESENTS ECONOMIC LOSS OF THE PLAINTIFF: $_____

(2) THE PORTION OF THE COMPENSATORY DAMAGES THAT REPRESENTS NON-ECONOMIC LOSS OF THE PLAINTIFF: $_____

(3) THE TOTAL AMOUNT OF THE COMPENSATORY DAMAGES SUSTAINED BY THE PLAINTIFF (TOTAL OF "ECONOMIC" AND "NON-ECONOMIC" LOSS): $_____

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

S.B. 120 requires that the jury distinguish between economic and non-economic damages. The distinction between economic and non-economic damages is significant, as different percentages of each may be recoverable against particular defendants, depending upon the allocation of liability. R.C. 2307.22, 2307.23.

3. COMPENSATORY DAMAGES. "Compensatory damages" include both economic and non-economic loss.

COMMENT

When plaintiff's claim for future damages exceeds $200,000, see OJI-CV 403.05 (claims on and after 1/5/88 but before 4/9/03).

4. ECONOMIC LOSS. R.C. 2307.011(C).
5. NON-ECONOMIC LOSS. R.C. 2307.011(F).
6. GENERAL VERDICT. OJI-CV 403.03 § 4 (claims arising before 1/5/88).

Chapter CV 431

DEFAMATION

CV 431.01	**Public official, public figure or limited purpose public figure** *[Rev. 9-13-03]*
CV 431.03	**Private figure involving both public and private issues** *[Rev. 9-13-03]*
CV 431.05	**Private figure in matters concerning labor dispute or when qualified privilege applies** *[Rev. 9-13-03]*
CV 431.07	**Damages** *[Rev. 9-13-03]*

COMMENT

Ohio courts no longer distinguish between libel (publication in writing) and slander (publication by speech or gesture). The elements of the two offenses are in practical effect merged in a cause of action called defamation.

There are preliminary questions of law in defamation cases for the judge to decide, the answers to which will determine whether the claimed defamation is actionable, and if so, what evidence is relevant to the issues and which of the jury instructions in this Chapter should be used. See generally Halpern, The Law of Defamation, Privacy, Publicity, and Moral Right (4 Ed.2000) 1–409.

Privileges. Privileges are classified as absolute or qualified. Whether a defendant is entitled to either class of privilege is a question of law for the court to decide.

An absolute privilege gives the publisher of the defamatory statement complete protection. Absolute privileges are based on the actor's status or position. Those entitled to assert absolute privilege include judges, parties and witnesses to litigation, jurors, lawyers, legislators, witnesses in legislative proceedings, government officers in executive positions, and others. See Restatement of the Law 2d, Torts (1977) Sections 585–592.

Qualified privileges arise from occasions in which the law protects communications required by a legal, moral or social duty. Restatement of the Law 2d, Torts (1977) Sections 593–596. See OJI-CV 431.01 § 11.

Statement of opinion or of fact. Section 11, Article I, Ohio Constitution protects statements of opinion however false, and this protection applies to media and non-media defendants. This is a question of law for the court to decide. *Wampler v. Higgins,* 93 Ohio St.3d 111, 2001–Ohio–1293; *Vail v. The Plain Dealer Publishing Company*, 72 Ohio St.3d 279, 1995–Ohio–187.

Four factors are used to decide whether the statement is one of opinion or of fact: the specific language used, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement was

used. *Vail v. The Plain Dealer Publishing Company*, supra.

Under U.S. constitutional law, a statement will be actionable if by reasonable interpretation, it contains matter that is capable of being proven true or false (and defamatory). *Milkovich v. Lorain Journal Co.* (1990), 497 U.S. 1.

Defamation per se and defamation per quod. The issue of whether defamation is per se or per quod is a question of law for the court to decide.

Defamation per se are those unambiguous statements that falsely impute a crime, a loathsome disease, a matter incompatible to business or profession, or serious sexual misconduct. Damages are presumed to flow from the statement. *McCartney v. Oblates of St. Francis deSales* (1992), 80 Ohio App.3d 345; Restatement of the Law 2d, Torts (1977) Section 570.

Defamation per quod is a statement that requires extrinsic evidence to demonstrate its defamatory nature. *Becker v. Toulmin* (1956), 165 Ohio St. 549, paragraph two of the syllabus. If the defamation is "per quod," plaintiff must prove special harm. *Becker v. Toulmin,* supra; *Cleveland Leader Printing Co. v. Nethersole* (1911), 84 Ohio St.118.

If the language of a claimed defamation per quod is reasonably susceptible of two meanings, one defamatory and one innocent, the defamatory meaning must be discarded as a matter of law. *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 372; *Holley v. WBNS 10TV, Inc.,* 149 Ohio App.3d 22, 2002-Ohio-4315; *McGee v. Simon & Schuster, Inc.* (2001), 154 F. Supp.2d 1308, 1313, n.4. Contra, *Gupta v. The Lima News*, 139 Ohio App.3d 538, 547, 2000–Ohio–1918.

Classification of plaintiff. There are four classifications of plaintiffs claiming defamation: a private figure, a public official, a public figure and a limited purpose public figure. How the plaintiff is classified is a question of law for the court. The classification will determine what must be proved and by what burden of proof.

Constitutional guarantees of freedom of speech and freedom of the press limit recovery for defamatory statements. The First Amendment to the United States Constitution; Section 11, Article I, Ohio Constitution. Public officials and public figures must prove by clear and convincing evidence that the defendant acted with actual malice as that constitutional standard is defined in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279–280 (making the statement with knowledge that it was false or with reckless disregard as to whether it was false or not). See *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369.

An otherwise private figure may be classified as a limited purpose public figure, if he or she participates in a public controversy and attains general notoriety in the community by reason of that participation. A limited purpose public figure must prove constitutional actual malice by clear and convincing evidence. *Gertz v. Robert Welch Inc.* (1974), 418 U.S. 323, 351; *Kassouf v. Cleveland Magazine City Magazines, Inc.* (2001), 142 Ohio App.3d 413; *Talley v. WHIO TV-7* (1998), 131 Ohio App.3d 164.

A private figure plaintiff must prove negligence by clear and convincing evidence. *Lansdowne v. Beacon Journal Publishing Company* (1987), 32 Ohio

St.3d 176. However, a private figure is required to prove actual malice instead of negligence (1) in cases arising from labor disputes in both the public and private sectors, *Dale v. Ohio Civil Service Employees Association* (1991), 57 Ohio St.3d 112, and (2) when the defendant asserts and the court determines as a matter of law that a qualified privilege applies. *A&B-Abell Elevator Co. v. Columbus/Central Ohio Bldg & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 1995-Ohio-66; *Jacobs v. Frank* (1991), 60 Ohio St.3d 111; *Hahn v. Kotten* (1975), 43 Ohio St.2d 237.

Burden of proof. In all defamation cases in Ohio, the plaintiff must prove the defendant's fault, i.e. either negligence or constitutional actual malice, by clear and convincing evidence. *Lansdowne v. Beacon Journal Publishing Company,* supra.

For all elements other than fault, the Committee believes (1) that public plaintiffs must prove them by clear and convincing evidence, *Celebrezze v. Dayton Newspapers, Inc.* (1988), 41 Ohio App.3d 343, 346–347, and (2) that private plaintiffs must prove them by the greater weight of the evidence. *Davis v. Jacobs* (1998), 126 Ohio App.3d 580, cited in *Gilbert v. WNIR 100 FM* (2001), 142 Ohio App.3d 725, 734–735. The United States Supreme Court has expressly declined to decide whether as a matter of federal constitutional law, the clear and convincing standard applies to elements other than actual malice, even in cases of a public figure or public official. *Harte-Hanks Communications, Inc. v. Connaughton* (1989), 491 U.S. 657, n. 2.

In all defamation cases, damages (except punitive damages) are proved by the greater weight of the evidence. Punitive damages must be proved by clear and convincing evidence. *Lansdowne v. Beacon Journal Publishing Company,* supra. See OJI-CV 431.07 § 8.

CV 431.01 Public official, public figure or limited purpose public figure *[Rev. 9-13-03]*

1. GENERAL. Defamation is a false written or oral statement that injures another's reputation.

2. PLAINTIFF'S CLAIM. The plaintiff claims that the defendant defamed him/her/it, causing injury. Defendant's alleged statement consisted of (*describe defendant's statement*).

3. PROOF OF CLAIM. Before you can find in favor of the plaintiff, you must find by clear and convincing evidence that

(A) the defendant made the alleged statement; and

(B) the statement (concerned) (was about) the plaintiff; and

(C) the statement was false; and

(D) (*only for defamation per quod*) the statement caused special harm to plaintiff; and

COMMENT

In defamation per quod cases, failure of proof of special damages will cause dismissal of the case. *Moore v. P. W. Pub. Co., Inc.* (1965), 3 Ohio St.2d 183, paragraph two of the syllabus. Special damages arise only from special harm.

(E) the statement was published to one or more persons other than the plaintiff; and

(F) the defendant in making the statement acted with actual malice.

4. CLEAR AND CONVINCING EVIDENCE. OJI-CV 303.07.

5. FALSE. A statement is false when it is not substantially true. It is substantially true when the (gist) (substance) (scheme) of the statement is true, or is justified by the facts, taking the statement as a whole. The defendant's words must be given their natural and ordinary meaning, taking into consideration the circumstances in which the statement was made. You must ignore any minor ways in which the statement is false. In deciding whether the statement was false you may not consider the defendant's belief as to the truth of the statement.

COMMENT

Drawn from *Krems v. University Hospitals of Cleveland* (1999), 133 Ohio App.3d 6; *Bruss v. The Vindication Printing Co.* (1996), 109 Ohio App.3d 396; *National Medic Services Corp. v. E.W. Scripps Co.* (1989), 61 Ohio App.3d 752.

6. SPECIAL HARM - PER QUOD CASES ONLY. "Special harm" is injury that is caused by the conduct of persons other than the plaintiff or the defendant acting as a result of the (*describe defamatory statement*). Special harm includes not only injury to reputation and exposure to (public hatred) (contempt) (ridicule) (shame) (disgrace), but also loss of income or business, loss of society, companionship and friendship, and (*describe other injuries*).

COMMENT

Drawn from *Bigelow v. Brumley* (1941), 138 Ohio St. 574, *Stokes v. Meimaris* (1996), 111 Ohio App.3d 176, and Restatement of the Law 2d, Torts (1977), Section 575, Comment *b*. "Special damages" has also been said to be those that do not follow as a necessary consequence of the defamation. *King v. Bogner* (1993), 88 Ohio App.3d 564, citing *Gennari v. Andres-Tucker Funeral Home* (1986), 21 Ohio St.3d 102 (an action for mental anguish and interference with property rights).

7. PROXIMATE CAUSE - PER QUOD CASES ONLY. OJI-CV 405.01 § 2.

8. PUBLISHED. "Published" means the (*describe statement*) was (read) (heard) and understood by a person other than the plaintiff. If only the plaintiff (read) (heard) it, the statement was not published.

9. ACTUAL MALICE. "Actual malice" occurs when the defendant makes a false statement either with knowledge that it is false or with reckless disregard of whether it is false or not.

COMMENT

Drawn from *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-80, *St. Amant v Thompson* (1968), 390 U.S. 727, 731, and *Varanese v. Gall* (1988), 35 Ohio St.3d 78.

10. RECKLESS DISREGARD. "Reckless disregard" means that the defendant acted while actually aware of the probable falsity of the statement, or the defendant entertained serious doubts as to the truth of the statement. The defendant's failure to investigate may be considered evidence that the defendant acted with reckless disregard to the statement's truth or falsity, but only if you find from the facts and circumstances that the defendant had serious doubts about the truth of the statement.

COMMENT

A media publisher who publishes a statement by a third party when the publisher "in fact entertained serious doubts as to the truth of his publication . . . shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant v. Thompson* (1968), 390 U.S. 727, 731; *Varanese v. Gall* (1988), 35 Ohio St.3d 78, 80. Reckless conduct is not measured by the reasonable person test.

11. AFFIRMATIVE DEFENSES.

(A) GENERAL. OJI-CV 303.03 § 4.

(B) REPORTER'S PRIVILEGE. R.C. 2317.04, .05.

The defendant claims that he/she/it is not liable to the plaintiff because the (*describe defamatory statement*) was a fair and impartial report of the (official proceeding) (official record). A statement is a fair and impartial report if it is substantially accurate; that is, if it conveys the (essence) (gist) (substance) of the (official proceeding) (official report) to the ordinary (reader) (listener), without misleading the (reader) (listener) by the inclusion of information that is both inaccurate and off-the-record, or the exclusion of relevant information in the report.

COMMENT

Drawn from R.C. 2317.04 and 2317.05, which describe "official proceeding" and "official record" respectively. The determination of whether a proceeding or a record is official is a question of law.

Both R.C. 2317.04 and 2317.05 state that a fair and impartial report of the proceeding or record is privileged "unless it is proved that such publication was made maliciously." While the privilege has been upheld, see *Hahn v Kotten* (1975), 43 Ohio St.2d 237, no court has held specifically that a fair and impartial publication is actionable because it was maliciously published. To the contrary, R.C. 2739.02 states, "Proof of the truth [of the matter] shall be a complete defense." The Committee believes in this age of full information and open discussion, it is difficult to understand how a fair and impartial report of the facts can be deemed malicious.

(C) QUALIFIED PRIVILEGE. The defendant claims that he/she/it is not liable to the plaintiff because the (*describe the defamatory statement*) was privileged having been made (*describe circumstances giving rise to a qualified privilege*). A statement is privileged only if it was made without actual malice, did not go beyond the purpose of the privilege, and was published to persons with a legitimate interest in the statement, and at a proper time and in a proper manner.

COMMENT

Drawn from *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 245-6.

Qualified privileges arise from occasions in which the law protects communications required by a legal, moral or social duty. Restatement of the Law 2d, Torts (1977) Sections 593–596. The underlying duty may arise in order to protect a legitimate interest of the actor, an interest of the recipient of the statement, or an interest held in common. Whether a qualified privilege exists is a question of law. Whether the defendant properly exercised the privilege may be a question of fact. The privilege is abused if the fact-finder determines by clear and convincing evidence that the defendant acted with constitutional actual malice. *A&B-Abell Elevator Co. v. Columbus/Central Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 1995-Ohio-66; *Hahn v. Kotten, supra.*

12. CONCLUSION - PER SE. If you find by clear and convincing evidence that the defendant defamed the plaintiff, then you must further decide the amount of damages to which the plaintiff is entitled.

13. CONCLUSION - PER QUOD. If you find by clear and convincing evidence that the defendant defamed the plaintiff thereby causing special harm, then you must further decide the amount of the damages, if any, to which the plaintiff is entitled.

14. DAMAGES. OJI-CV 431.07.

CV 431.03 Private figure involving both public and private issues *[Rev. 9-13-03]*

COMMENT

In per se cases only, presumed damages can be awarded to private figures only as follows: (1) when the case involves a private issue, the private figure must prove negligence by clear and convincing evidence (see OJI-CV 431.07 § 3) and (2) when the case involves an issue of public concern, the private figure must prove actual malice by clear and convincing evidence to recover presumed damages, but if the private figure proves only negligence by clear and convincing evidence, the private figure can recover only actual damages that he or she proves. *Dun Bradstreet, Inc. v. Greenmoss Builders* (1985), 472 U.S. 749. See OJI-CV 431.07 § 2. Note there is a different rule for private figures when the case involves a labor dispute or when special privilege applies. See OJI-CV 431.05.

1. GENERAL. Defamation is a false written or oral statement that injures another's reputation.

2. PLAINTIFF'S CLAIM. The plaintiff claims that the defendant defamed him/her/it, causing injury. Defendant's alleged statement consisted of (*describe defendant's statement*).

3. PROOF OF CLAIM. Before you can find in favor of the plaintiff,

(A) you must find by the greater weight of the evidence that

(1) the defendant made the alleged statement; and

(2) the statement (concerned) (was about) the plaintiff; and

(3) the statement was false; and

(4) (*use only for defamation per quod*) the statement caused special harm to the plaintiff; and

COMMENT

In defamation per quod cases, failure of proof of special damages will cause dismissal of the case. *Moore v. P. W. Pub. Co., Inc.* (1965), 3 Ohio St.2d 183, paragraph two of the syllabus. Special damages arise only from special harm.

(5) the statement was published to one or more persons other than the plaintiff; and

(B) you must also find by clear and convincing evidence that the defendant in making the statement acted with (negligence) (negligence or actual malice).

4. BURDEN OF PROOF. Note that the plaintiff must prove the defendant's (negligence) (negligence or actual malice) by clear and convincing evidence, while the other (four) (five) elements must be proved by the greater weight of the evidence. These are two different burdens of proof, which will now be explained.

5. CLEAR AND CONVINCING EVIDENCE. OJI-CV 303.07.

6. PREPONDERANCE. OJI-CV 303.05.

7. FALSE. OJI-CV 431.01 § 5.

8. SPECIAL HARM. OJI-CV 431.01 § 6.

9. PROXIMATE CAUSE. OJI-CV 405.01 § 2.

COMMENT

This instruction must be used (1) in all per quod cases, and (2) in per se cases involving a public issue when the proof of fault is negligence.

10. PUBLISHED. OJI-CV 431.01 § 8.

11. NEGLIGENCE. OJI-CV 401.01 §§ 1 and 2.

12. ACTUAL MALICE. OJI-CV 431.01 § 9.

13. RECKLESS DISREGARD. OJI-CV 431.01 § 10.

14. AFFIRMATIVE DEFENSES. OJI-CV 431.01 § 11.

15. CONCLUSION - PER SE. OJI-CV 431.01 § 12.

16. CONCLUSION - PER QUOD. OJI-CV 431.01 § 13.

17. DAMAGES. OJI-CV 431.07 §§ 2 and 3.

CV 431.05 Private figure in matters concerning labor dispute or when qualified privilege applies *[Rev. 9-13-03]*

COMMENT

A private figure is required to prove constitutional actual malice by clear and convincing evidence (1) in cases arising from labor disputes in both the public and private sectors, *Dale v. Ohio Civil Service Employees Association* (1991), 57 Ohio St.3d 112, and (2) when the defendant asserts and the court determines as a matter of law that a qualified privilege applies. *A&B-Abell Elevator Co. v. Columbus/Central Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 1995-Ohio-66; *Jacobs v. Frank* (1991), 60 Ohio St.3d 111; *Hahn v. Kotten*

(1975), 43 Ohio St.2d 237. For all elements other than constitutional actual malice, the Committee believes that private plaintiffs must prove them by the greater weight of the evidence. *Davis v. Jacobs* (1998), 126 Ohio App.3d 580, cited in *Gilbert v. WNIR 100 FM* (2001), 142 Ohio App.3d 725.

1. GENERAL. Defamation is a false written or oral statement that injures another's reputation.

2. PLAINTIFF'S CLAIM. The plaintiff claims that the defendant defamed him/her/it, causing injury. Defendant's alleged statement consisted of (*describe defendant's statement*).

3. PROOF OF CLAIM. Before you can find in favor of the plaintiff,

(A) you must find by the greater weight of the evidence that

(1) the defendant made the alleged statement; and

(2) the statement (concerned) (was about) the plaintiff; and

(3) the statement was false; and

(4) (*use only for defamation per quod*) the statement caused special harm to plaintiff; and

COMMENT

In defamation per quod cases, failure of proof of special damages will cause dismissal of the case. *Moore v. P. W. Pub. Co., Inc.* (1965), 3 Ohio St.2d 183, paragraph two of the syllabus. Special damages arise only from special harm.

(5) the statement was published to one or more persons other than the plaintiff; and

(B) you must also find by clear and convincing evidence that the defendant in making the statement acted with actual malice.

4. BURDEN OF PROOF. Note that the plaintiff must prove the defendant's actual malice by clear and convincing evidence, while the other (four) (five) elements must be proved by the greater weight of the evidence. These are two different burdens of proof, which will now be explained.

5. CLEAR AND CONVINCING EVIDENCE. OJI-CV 303.07.
6. PREPONDERANCE. OJI-CV 303.05.
7. FALSE. OJI-CV 431.01 § 5.
8. SPECIAL HARM. OJI-CV 431.01 § 6.
9. PROXIMATE CAUSE - PER QUOD CASES ONLY. OJI-CV 405.01 § 2.
10. PUBLISHED. OJI-CV 431.01 § 8.
11. ACTUAL MALICE. OJI-CV 431.01 § 9.
12. RECKLESS DISREGARD. OJI-CV 431.01 § 10.
13. AFFIRMATIVE DEFENSES. OJI-CV 431.01 § 11.
14. CONCLUSION - PER SE. OJI-CV 431.01 § 12.
15. CONCLUSION - PER QUOD. OJI-CV 431.01 § 13.
16. DAMAGES. OJI-CV 431.07.

CV 431.07 Damages ***[Rev. 9-13-03]***

COMMENT

"The tort of defamation has been conceived of as serving three separate functions: (1) to compensate the plaintiff for injury to his reputation, for his pecuniary loss and for his emotional distress, (2) to vindicate him and aid in restoring his reputation, and (3) to punish the defendant and dissuade him and others from publishing defamatory statements. The traditional remedy has been an award of damages, whether compensatory, nominal, or punitive. The award of damages has served all three purposes, to a greater or lesser degree." Restatement of Law 2d, Torts (1977), unnumbered section entitled "Special Note on Remedies for Defamation (Other Than Damages)" following Section 623, at page 326.

In defamation per se cases only, damages are presumed (provided the requisite degree of fault has been proved). *Becker v. Toulmin* (1956), 165 Ohio St. 549, paragraphs one and two of the syllabus. The Committee believes that this includes injury to reputation, loss of society and friendship, loss of income and any other injury. While no proof is necessary, the plaintiff may offer evidence about the amount of damages.

In defamation per quod cases, the plaintiff is required to prove some special harm (injury caused by third parties). *Moore v. P. W. Publishing Co., Inc.* (1965), 3 Ohio St.2d 183, paragraphs one and two of the syllabus. The Committee believes that if the plaintiff's evidence meets that requirement, all other types of general damages may be awarded.

1. PRESUMED DAMAGES (PER SE CASES ONLY) - PUBLIC OFFICIAL, PUBLIC FIGURE, LIMITED PURPOSE PUBLIC FIGURE.

(A) If you find in favor of the plaintiff, it is assumed that the plaintiff's reputation was injured, and you may award the plaintiff an amount of money that you decide is reasonable and fair for the plaintiff's (injury) (injuries) directly caused by (*describe defamatory statement*).

(B) ADDITIONAL. You must put aside all (passion) (prejudice) (personal dislikes) (hatred) (anger). You may take into consideration all facts and circumstances in evidence to decide the amount of these damages. The following are the types of injury for which you may award compensation:

(*Use appropriate alternative[s]*)

(1) the injury to the plaintiff's reputation, including (exposure to [public hatred] [contempt] [ridicule] [shame] [disgrace]);

(*or*)

(2) loss of (trade) (business) (professional) income;

(*or*)

(3) the plaintiff's (mental anguish) (pain) (suffering);

(*or*)

(4) loss of society, companionship, and friendship;

(*or*)

(5) (*describe other injuries*).

2. PRESUMED DAMAGES (PER SE CASES ONLY) - PRIVATE FIGURE INVOLVING PUBLIC ISSUE.

(A) ACTUAL MALICE. If you find that the plaintiff proved by clear and convincing evidence that the defendant acted with actual malice, it is assumed that the plaintiff's reputation was injured, and you may award the plaintiff an amount of money that you decide is reasonable and fair for the plaintiff's (injury) (injuries) directly caused by (*describe defamatory statement*).

(B) ADDITIONAL. OJI-CV 431.07 § 1 (B).

(C) NEGLIGENCE. If you find that the plaintiff proved by clear and convincing evidence that the defendant acted (only) with negligence, the plaintiff must prove actual injury. You may award an amount of money that you decide by the greater weight of the evidence will fairly and adequately (compensate) (pay) for the actual (injury) (injuries) directly caused by the defamation.

COMMENT

If the private figure seeks presumed or punitive damages, he/she must prove

the defendant acted with constitutional actual malice. Note that punitive damages cannot be recovered without proof of "common law" malice. See OJI-CV 431.07 § 8 and the COMMENT thereunder.

If the private figure seeks recovery only on the basis of the defendant's negligence, the foregoing instructions must be modified by eliminating § 2(A) and reading § 2(C) before § 2(B).

3. PRESUMED DAMAGES (PER SE CASES ONLY) - PRIVATE FIGURE INVOLVING PRIVATE ISSUE.

(A) If you find that the plaintiff proved by clear and convincing evidence that the defendant acted with negligence, it is assumed that plaintiff's reputation was injured and you may award the plaintiff an amount of money that you decide is reasonable and fair for the plaintiff's (injury) (injuries) directly caused by (*describe defamatory statement*).

(B) ADDITIONAL. OJI-CV 431.07 § 1(B).

4. SPECIAL DAMAGES.

COMMENT

The Committee recommends that in per quod cases the jury be instructed that if it finds for the plaintiff, it will, in addition to returning a general verdict, answer an interrogatory that will specify the special harm. This will not only show compliance with the "special harm" requirement but it will also make it easier to tailor the following instruction to the evidence.

(A) If you find in favor of the plaintiff, you may award the plaintiff an amount of money that you decide by the greater weight of the evidence will fairly and adequately compensate the plaintiff for the special harm; that is, for the (injury) (injuries) to the plaintiff's reputation caused by the conduct of persons other than the plaintiff or the defendant acting as a result of the (*describe defamatory statement*).

(B) ADDITIONAL. OJI-CV 431.07 § 1(B).

(C) If you have found that the plaintiff has suffered special harm to the plaintiff's reputation, you may award damages for any other injury caused by the defamation.

5. PROXIMATE CAUSE. OJI-CV 405.01 § 2.

6. PREPONDERANCE. OJI-CV 303.05.

7. NOMINAL DAMAGES. OJI-CV 315.53.

COMMENT

The Committee believes that in defamation per quod cases, nominal damages

may be awarded if the plaintiff has proved special harm. There is no Ohio case directly on point. *Moore v. P. W. Publishing Co., Inc.* (1965), 3 Ohio St.2d 183, (paragraphs one and two of the syllabus), requires proof of "special damages" in per quod cases, and other opinions use the same phrase. However, "special damages" can not exist unless there is special harm. Restatement of the Law 2d, Torts (1977), Section 620 recognizes that nominal damages may also be awarded when they are the only damages claimed and the purpose of the suit is to vindicate the plaintiff's reputation by a verdict that establishes the falsity of the defendant's statement. See also Restatement of the Law 2d, Torts (1977) 326, unnumbered section entitled "Special Note on Remedies for Defamation (Other Than Damages)."

8. PUNITIVE DAMAGES. OJI-CV 315.37.

COMMENT

The appropriate instructions on punitive damages are at OJI-CV 315.37. Substitute the following for Section § 1 of OJI-CV 315.37 and then continue with the pertinent instructions in OJI-CV 315.37 §§ 2 through 13.

A. GENERAL. You will also decide whether the defendant shall be liable for punitive damages in addition to any other damages you award the plaintiff. The purpose of punitive damages is to punish the offending party to discourage others from similar conduct. The malice needed to award punitive damages requires proof of the defendant's (conscious state of mind) (attitude towards the plaintiff) (motives).

You may decide that the defendant is liable for punitive damages if you find by clear and convincing evidence that

(*Use appropriate alternative[s]*)

(A)(1) The defendant's acts or failures to act demonstrated malice, aggravated or egregious fraud, oppression, or insult,

(*or*)

(A)(2) The defendant as (principal) (employer) authorized, participated in, or ratified act or failures to act of an (agent) (employee) that demonstrated malice, aggravated or egregious fraud, oppression, or insult,

(*and*)

(B) the plaintiff has presented proof of actual damages that resulted from those acts or failures to act of (the defendant) (an agent of the defendant) (an employee of the defendant).

COMMENT

The Committee believes that R.C. 2315.21 applies to defamation, because defamation is a tort action for injury to person or property. R.C. 2315.21(A)(4). See *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 214.

The common law "actual malice" necessary for punitive damages (ill will, intention to injure, etc.) is to be distinguished from the constitutional actual malice required by *Sullivan* in defamation cases to show fault (knowledge of or disregard for falsity). *Varanese v. Gall* (1988), 35 Ohio St.3d 78, paragraph one of the syllabus. In a case concerning public plaintiffs or private figures involved in public issues, the judge may wish to give an additional instruction clarifying this distinction.

(C) OJI-CV 315.37 §§ 2 through 13.

9. RETRACTION OR CORRECTION.

COMMENT

The Committee believes that R.C. 2739.13 and 2739.14 (Publishing corrected statements) provide a basis for the application of the following instruction. Please note that the U.S. Supreme Court in *Miami Herald Publishing Co. v. Tornillo* (1974), 418 U.S. 241, held that a statute requiring a newspaper to provide a right of reply to a political candidate violated the First Amendment.

(A) MITIGATION OF DAMAGES. The defendant claims the he/she/it (*describe the claimed retraction or correction*), and that this action (mitigated) (reduced) (lessened) (eliminated) the damages claimed by the plaintiff. In deciding this issue, you may consider the (content) (wording) of the defendant's (retraction) (correction), its location, its noticeability, its circulation, the time when it was published, and all the facts and circumstances in evidence bearing on the plaintiff's damages.

(B) NEGATING PUNITIVE ACTUAL MALICE. The defendant claims the he/she/it (*describe the claimed retraction or correction*), and that this action shows that the defendant did not act with the malice required for punitive damages, aggravated or egregious fraud, oppression or insult in publishing the (*describe defamatory statement*). Therefore, the defendant claims that he/she/it is not liable for punitive damages. In deciding this issue, you may consider the (content) (wording) of the defendant's (retraction) (correction), its location, its noticeability, its circulation, the time when it was published, and all the facts and circumstances in evidence bearing on the plaintiff's damages.

Chapter CV 433

INVASION OF PRIVACY

CV 433.01 **Right of publicity in individual's persona (claims arising on and after 11/22/99)** ***[Rev. 5-8-10]***

CV 433.03 **Appropriation of name or likeness – common law claim** ***[Rev. 5-8-10]***

CV 433.05 **Publication of private facts** ***[Rev. 5-8-10]***

CV 433.07 **Intrusion into private activities** ***[Rev. 5-8-10]***

CV 433.09 **False light** ***[Rev. 5-8-10]***

COMMENT

A person who invades the right of privacy of another person may be subject to liability for the resulting harm to the interests of the other person. *Sustin v. Fee* (1982), 69 Ohio St.2d 143. The right of privacy is the right of a person to be let alone. It is the right to be free from the unwarranted appropriation or exploitation of one's personality; the publicizing of one's private affairs with which the public has no legitimate concern; the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities; and to live without publicity that places one in a false light in the public eye. *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451. The burden of proof is upon the plaintiff to prove the plaintiff's claim by a preponderance of the evidence.

CV 433.01 Right of publicity in individual's persona R.C. Chapter 2741 (claims arising on and after 11/22/99) *[Rev. 5-8-10]*

COMMENT

R.C. Chapter 2741 provides a statutory claim for relief for violation of the right of publicity in an individual's persona. R.C. 2741.02(E) and 2741.09 exclude application of the Chapter in particular circumstances. These circumstances include use of an aspect of a plaintiff's persona in connection with a news story, broadcast, etc.; use in relation to a political campaign; use in a literary or dramatic work; use in an original work of fine art; use to correctly identify a plaintiff as the author or performer of a work; use in reporting an event of general public interest; use solely in plaintiff's role as a member of the public if the plaintiff is not named or otherwise singled out as an individual; certain use by institutions of higher learning; and use protected by the First Amendment to the United States Constitution as long as the use does not convey or reasonably suggest endorsement by the plaintiff.

The Committee takes no position on whether these exceptions are in the nature of affirmative defenses or questions of law for the court. The trial court should address the exceptions as is appropriate under the facts and circumstances of each case and may need to draft appropriate instructions.

1. GENERAL. The plaintiff claims that the defendant violated the plaintiff's right of publicity by using (his/her persona) (the persona of *[insert name of applicable individual]*) for a commercial purpose.

COMMENT

The right of publicity in an individual's persona is freely transferable and descendible, in whole or in part, by contract, license, gift, trust, will, or intestate succession. R.C. 2741.04.

2. PROOF OF CLAIM. To establish a claim for violation of the right of publicity by use of (the plaintiff's) (*insert name of applicable individual*)'s (name) (voice) (signature) (photograph) (image) (likeness) (distinctive appearance), the plaintiff must prove by the greater weight of the evidence that

(A) the State of Ohio was ([the plaintiff's] [*insert name of applicable individual*]'s residence or domicile) ([*insert name of applicable individual*]'s residence or domicile at the date of the individual's death); and

(B) the defendant used any aspect of (the plaintiff's) (*insert name of applicable individual*)'s (name) (voice) (signature) (photograph) (image) (likeness) (distinctive appearance) for a commercial purpose; and

(C) the defendant did not have written consent to use (the plaintiff's) (*insert name of applicable individual*)'s (name) (voice) (signature) (photograph) (image) (likeness) (distinctive appearance).

(D) USE IN ADVERTISEMENT OR SOLICITATION (ADDITIONAL). If you find that (*insert name of applicable defendant*) is an (owner) (employee) of a (newspaper) (magazine) (radio or television network or station) (cable television system) (billboard) (transit ad) (global communications network) (*insert other medium used for advertising*), the plaintiff must also prove that the defendant had knowledge that the use of (the plaintiff's) (*insert name of applicable individual*)'s persona in an advertisement or solicitation was unauthorized.

COMMENT

Drawn from R.C. 2741.02 and 2741.03.

R.C. 2741.02 also applies to decedents who died on or after January 1, 1998, and

for a period of 60 years after the individual's death. If the individual is deceased, section 2(B) of this instruction the court must modify accordingly. A defendant may lawfully use, for commercial purposes, the persona of an individual who has died if the defendant obtained written consent from a person specified in R.C. 2741.05 who owns the individual's right of publicity. R.C. 2741.02(B) permits the use of a decedent's persona without written consent if the decedent's name was the name of a business entity or a trade name at the time of the decedent's death.

In addition, R.C. 2741.02 applies to deceased members of the Ohio national guard or the armed forces of the United States for a period of ten years after the date of death.

3. PERSONA. "Persona" means an individual's name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects has commercial value.

COMMENT

Drawn from R.C. 2741.01.

4. COMMERCIAL PURPOSE. "Commercial purpose" means the use of or reference to an aspect of an individual's (name) (voice) (signature) (photograph) (image) (likeness) (distinctive appearance)

(*Use appropriate alternative[s]*)

(A) on or in connection with a place, product, merchandise, goods, services, or other commercial activities;

(*or*)

(B) for advertising or soliciting the purchase of products, merchandise, goods, services, or other commercial activities;

(*or*)

(C) for the purpose of promoting travel to a place;

(*or*)

(D) for the purpose of fundraising.

COMMENT

Drawn from R.C. 2741.01.

5. NAME. "Name" means the actual, assumed, or clearly identifiable name of or reference to a living or deceased individual that identifies the individual.

COMMENT

R.C. 2741.01.

6. RIGHT OF PUBLICITY. "Right of publicity" means the property right in an individual's persona to use the individual's persona for a commercial purpose.

COMMENT

R.C. 2741.01.

7. WRITTEN CONSENT. "Written consent" includes written, electronic, digital, or any other verifiable means of authorization.

COMMENT

R.C. 2741.01.

8. KNOWINGLY. OJI-CR 417.11; R.C. 2901.22(B).

9. AFFIRMATIVE DEFENSES:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) CLAIMED AFFIRMATIVE DEFENSE.

COMMENT

If the trial judge decides to treat any of the exceptions in R.C. 2741.09 or 2741.02(D) as an affirmative defense, the court should draft appropriate jury instructions.

10. CONCLUSION. OJI-CV Chapter 313.

11. PROXIMATE CAUSE. OJI-CV 405.01.

12. DAMAGES. If you find for the plaintiff, you will then decide what amount of money will compensate the plaintiff for the (damage) (injury) (harm) caused by the defendant.

(*Use appropriate alternative*)

(A) ACTUAL DAMAGES. "Actual damages" includes, but is not limited to, any profits derived from and attributable to the unauthorized use of the plaintiff's persona for a commercial purpose.

COMMENT

Drawn from R.C. 2741.07(A)(1)(a) and (A)(2).

(*or*)

(B) STATUTORY DAMAGES. You shall award an amount of at least $2,500 and not more than $10,000, taking into account the willfulness of the violation, the harm to the plaintiff, and the ability of the defendant to pay a civil damage award.

COMMENT

The Committee believes that harm to the "persona in question" means "harm to the plaintiff."

The plaintiff must elect actual damages or statutory damages. As part of the statutory damages, R.C. 2741.07(D) authorizes the court to award additional items of damages such as attorney's fees, court costs, expenses, and treble damages if a party identified in division (E) of 2741.02 had knowledge of the unauthorized use; to order injunctive relief; and to order the impoundment of products, merchandise, goods, or other materials alleged to have been made or used in violation of section 2741.02, and plates, molds, etc. from which products or other materials may be reproduced.

13. PUNITIVE DAMAGES. OJI-CV 315.37; R.C 2741.07(A)(1)(c), 2315.21.

14. WILLFUL MISCONDUCT. OJI-CV 401.41 § 1.

CV 433.03 Appropriation of name or likeness – common law claim *[Rev. 5-8-10]*

1. GENERAL. The plaintiff claims that the defendant violated the plaintiff's right of privacy by the appropriation of his/her (personality) (name) (likeness) (identity) (reputation) (prestige) (social or commercial standing) (public interest) (*insert other value[s] of the plaintiff's personality*) for the use or benefit of the defendant.

2. PROOF OF CLAIM. To establish a claim for invasion of privacy by appropriation of the personality of the plaintiff, he/she must prove by the greater weight of the evidence that

(A) the defendant appropriated the (personality) (name) (likeness) (identity)

(reputation) (prestige) (social or commercial standing) (public interest) (*insert other value[s] of the plaintiff's personality*) of the plaintiff; and

(B) the defendant's appropriation was not (authorized) (justified); and

(C) the defendant's appropriation was for the use or benefit of the defendant.

COMMENT

Zacchini v. Scripps-Howard Broadcasting Co. (1976), 47 Ohio St.2d 224, paragraph one of the syllabus, reversed on other grounds, 433 U.S. 562 (1977); *Housh v. Peth* (1956), 165 Ohio St. 35; *Vinci v. American Can Co.* (1990), 69 Ohio App.3d 727.

3. APPROPRIATION. "Appropriation" means taking, making use of, or exploiting for one's own use or benefit something that belongs to another. It is not enough that the defendant has adopted for himself/herself a name that is the same as the plaintiff, so long as the defendant does not pass himself/herself off as the plaintiff or otherwise seek to obtain for himself/herself the values or benefits of the plaintiff's (personality) (name) (likeness) (identity) (reputation) (prestige) (social or commercial standing) (public interest) (*insert other value[s] of the plaintiff's personality*). "Appropriation" does not include incidental use of another's (personality) (name) (likeness) (identity) (reputation) (prestige) (social or commercial standing) (public interest) (*insert other value[s] of the plaintiff's personality*).

COMMENT

Vinci v. American Can Co. (1984), 9 Ohio St.3d 98; *Zacchini v. Scripps-Howard Broadcasting Co.* (1976), 47 Ohio St.2d 224, paragraph one of the syllabus, reversed on other grounds, 433 U.S. 562 (1977); *Housh v. Peth* (1956), 165 Ohio St. 35; *Vinci v. American Can Co.* (1990), 69 Ohio App.3d 727.

4. INCIDENTAL USE. "Incidental use" of another's (personality) (name) (likeness) (identity) (reputation) (prestige) (social or commercial standing) (public interest) (*insert other value[s] of the plaintiff's personality*) means mere mention of or reference to (it) (them) in connection with the legitimate mention of the other's public activities; or publication for purposes other than taking advantage of the other's reputation, prestige, or other value associated with him/her.

COMMENT

Drawn from *Vinci v. American Can Co.* (1990), 69 Ohio App.3d 727 quoting

Restatement of the Law 2d, Torts (1977), Section 652C, Comment (d).

5. USE OR BENEFIT. "Use or benefit" is not limited to (commercial) (pecuniary) benefit.

COMMENT

Drawn from *Vinci v. American Can Co.* (1984), 9 Ohio St.3d 98; *Zacchini v. Scripps-Howard Broadcasting Co.* (1976), 47 Ohio St.2d 224, paragraph one of the syllabus, reversed on other grounds, 433 U.S. 562 (1977).

6. CONCLUSION. OJI-CV Chapter 313.

7. PROXIMATE CAUSE. OJI-CV 405.01.

8. DAMAGES. OJI-CV Chapter 315.

CV 433.05 Publication of private facts *[Rev. 5-8-10]*

COMMENT

This form of Invasion of Privacy corresponds to the Restatement of the Law 2d, Torts (1977), Section 652D.

1. GENERAL. The plaintiff claims that the defendant violated the plaintiff's right of privacy by publicizing facts concerning the plaintiff's private life.

2. PROOF OF CLAIM. To establish a claim for invasion of privacy by publicizing facts concerning the private life of the plaintiff, the plaintiff must prove by the greater weight of the evidence that

(A) the defendant publicized facts concerning the private life of the plaintiff;

(B) the matter publicized was not a legitimate concern to the public;

(C) the publicity that the defendant gave would be highly offensive and objectionable to a reasonable person of ordinary sensibilities; and

(D) the defendant acted intentionally in publicizing the particular facts.

COMMENT

Drawn from *Killilea v. Sears, Roebuck & Co.* (1985), 27 Ohio App.3d 163; Restatement of the Law 2d, Torts (1977), Section 652D.

3. PUBLICIZING. "Publicizing" means communicating the matter to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.

COMMENT

Drawn from *Killilea v. Sears, Roebuck & Co.* (1985), 27 Ohio App.3d 163.

4. INTENTIONALLY. "Intentionally" means purposely.

5. PURPOSELY. OJI-CR 417.01; R.C. 2901.22 (A).

6. CONCLUSION. OJI-CV Chapter 313.

7. PROXIMATE CAUSE. OJI-CV 405.01.

8. DAMAGES. OJI-CV Chapter 315.

CV 433.07 Intrusion into private activities *[Rev. 5-8-10]*

COMMENT

This form of Invasion of Privacy corresponds to the Restatement of the Law 2d, Torts (1965), Section 652B.

1. GENERAL. The plaintiff claims that the defendant violated the plaintiff's right of privacy by wrongfully intruding into the plaintiff's private activities.

2. PROOF OF CLAIM. In order to establish a claim for invasion of privacy by wrongfully intruding into the plaintiff's private activities, the plaintiff must prove by the greater weight of the evidence that

(A) the defendant intentionally intruded, physically or otherwise, into the (private activities) (solitude) (seclusion) of the plaintiff; and

(B) the intrusion by the defendant would be highly offensive to a reasonable person.

COMMENT

Drawn from *Miller v. Children's Hospital Medical Center*, Hamilton App. No. C-050738, 2006-Ohio-3861; Restatement of the Law 2d, Torts (1965), Section 652B.

3. PRIVATE ACTIVITIES. "Private activities" means activities that are not public in nature.

4. INTENTIONALLY. "Intentionally" means purposely.

5. PURPOSELY. OJI-CR 417.01; R.C. 2901.22(A).

6. CONCLUSION. OJI-CV Chapter 313.

7. PROXIMATE CAUSE. OJI-CV 405.01.

8. DAMAGES. OJI-CV Chapter 315.

CV 433.09 False light *[Rev. 5-8-10]*

COMMENT

In *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, the Ohio Supreme Court adopted Restatement of the Law 2d, Torts (1977) Section 652E.

1. GENERAL. The plaintiff claims that the defendant violated his/her right of privacy by placing the plaintiff in a false light.

COMMENT

Invasion of privacy is an individual right. See Restatement of the Law 2d, Torts (1977) Section 652I.

2. PROOF OF CLAIM. To establish a claim for invasion of privacy by placing the plaintiff in a false light, the plaintiff must prove by the greater weight of the evidence that

(A) the defendant publicized a matter concerning the plaintiff;

(B) the publicity of the matter placed the plaintiff before the public in a false light;

(C) the false light in which the plaintiff was placed would be highly offensive to a reasonable person; and

(D) the defendant

(*Use appropriate alternative[s]*)

(1) had knowledge of the falsity of the publicized matter and the false light in which it placed the plaintiff;

(*or*)

(2) acted with reckless disregard as to the falsity of the publicized matter and the false light in which it placed the plaintiff.

COMMENT

Drawn from Restatement of the Law 2d, Torts (1977) Section 652E. See, also,

Welling v. Weinfeld, 113 Ohio St.3d 464, 2007-Ohio-2451.

3. PUBLICITY. "Publicity" means communicating in any manner the matter to the public at large or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.

COMMENT

Drawn from Restatement of the Law 2d, Torts (1977) Section 652D, Comment a. See, also, *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451.

4. KNOWINGLY. OJI-CR 417.11; R.C. 2901.22(B).
5. RECKLESSLY. OJI-CR 417.17; R.C. 2901.22(C).
6. CONCLUSION. OJI-CV Chapter 313.
7. PROXIMATE CAUSE. OJI-CV 405.01.
8. DAMAGES. OJI-CV Chapter 315.

Chapter CV 435

ABUSE OF PROCESS

CV 435.01 Abuse of process *[Rev. 2-16-13]*

CV 435.01 Abuse of process *[Rev. 2-16-13]*

1. GENERAL. The plaintiff claims that the defendant has engaged in an abuse of process. Abuse of process is the use of a properly initiated (lawsuit) (proceeding) to achieve a result that the court does not have authority to order.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant began a (lawsuit) (proceeding) in proper form and with probable cause;

(B) the defendant perverted the (lawsuit) (proceeding) to attempt to accomplish an ulterior purpose for which it was not designed; and

(C) the plaintiff has been directly damaged by the wrongful use of process.

COMMENT

Drawn from *Robb v. Chagrin Lagoons Yacht Club*, 75 Ohio St.3d 264, 1996-Ohio-189; *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 1994-Ohio-503.

3. PROBABLE CAUSE. "Probable cause" means a reasonable belief, supported by trustworthy information and circumstances, that the defendant's prior (lawsuit) (proceeding) was legally just and proper. The relevant information and circumstances are those actually known or reasonably within the contemplation of the defendant. If you find that the defendant did not have probable cause to believe that the prior (lawsuit) (proceeding) was legally just and proper at the time of filing, then the plaintiff cannot recover.

COMMENT

Drawn from *Huber v. O'Neill*, 66 Ohio St.2d 28 (1981); *Baryak v. Kirkland*, 137 Ohio App.3d 704 (11th Dist. 2000); *Evans v. Smith*, 97 Ohio App.3d 59 (1st Dist. 1994).

If the defendant did not have probable cause to institute the prior proceeding,

then the appropriate claim for relief may be malicious prosecution. *See* OJI-CV Chapter 439.

4. ULTERIOR PURPOSE. "Ulterior purpose" means the (lawsuit) (proceeding) was instituted as a form of coercion to obtain a result not properly involved in the (lawsuit) (proceeding) (*describe result such as the surrender of property or payment of money*). The (lawsuit) (proceeding) was used as a threat.

COMMENT

Drawn from *Robb v. Chagrin Lagoons Yacht Club*, 75 Ohio St.3d 264, 1996-Ohio-189; *Clermont Environmental Reclamation Co. v. Hancock*, 16 Ohio App.3d 9 (12th Dist. 1984).

5. AFFIRMATIVE DEFENSE. OJI-CV 303.03 § 4.
6. CONCLUSION. OJI-CV Chapter 313.
7. PROXIMATE CAUSE. OJI-CV 405.01.
8. COMPENSATORY DAMAGES. OJI-CV Chapter 315.
9. PUNITIVE DAMAGES. OJI-CV 315.37.

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Chapter CV 437

SPOLIATION

CV 437.01 Spoliation (Destruction of evidence) *[Rev. 9/14/19]*

CV 437.01 Spoliation (Destruction of evidence) *[Rev. 9/14/19]*

1. GENERAL. The plaintiff claims that the defendant destroyed evidence. In order for the plaintiff to recover, you must find by the greater weight of the evidence that

(A) there was a (pending) (probable) lawsuit involving the plaintiff; and

(B) the defendant knew that a lawsuit involving the plaintiff was (pending) (probable); and

(C) the defendant willfully destroyed evidence for the purpose of disrupting the plaintiff's ability to prove a (claim) (defense) in the (pending) (probable) lawsuit; and

(D) the defendant's conduct disrupted the plaintiff's ability to prove a (claim) (defense) in the (pending) (probable) lawsuit; and

(E) the defendant's conduct was a proximate cause of (injury) (damage) to the plaintiff.

COMMENT

A claim for relief exists in tort for destruction of evidence, which may be maintained between the parties to the primary action and against third parties. Such a claim may be brought at the same time and as a part of the primary action.*Smith v. Howard Johnson Co., Inc.*, 67 Ohio St.3d 28, 1993-Ohio-229.

The Supreme Court of Ohio stated in *Smith* that a claim exists for "interference with or destruction of evidence" however, the court in *Elliott-Thomas v. Smith*, 154 Ohio St.3d 11, 2018-Ohio-1783, clarified that "allegations of intentional interference with or concealment of evidence are not actionable under the independent tort of spoliation of evidence."

In a 1994 opinion arising out of a medical malpractice claim where the physician was found liable and compensatory damages were awarded, the Supreme Court of Ohio held that "an intentional alteration, falsification or destruction of evidence" by the physician may be used as grounds for a claim for punitive damages where the underlying claim was not destruction of evidence whether or not the act "directly causes compensable harm." *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 1994-Ohio-324. Based upon the court's clarification in *Elliot-Thomas*, the Committee believes that "alteration" or "falsification" of evidence would no longer suffice as the basis for an intentional spoliation claim.

Claims for spoliation of evidence may be brought after the primary action has

been concluded only when evidence of spoliation is not discovered until after the conclusion of the primary action. *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St.3d 488, 2001-Ohio-1593.

2. WILLFUL. "Willful" implies an intentional deviation from a clear duty or from a definite rule of conduct or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting (damage) (loss).

COMMENT

Drawn from *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, citing *Tighe v. Diamond*, 149 Ohio St. 520 (1948).

3. CONCLUSION. OJI-CV Chapter 313.
4. PROXIMATE CAUSE. OJI-CV 405.01.
5. COMPENSATORY DAMAGES. OJI-CV Chapter 315.
6. PUNITIVE DAMAGES. OJI-CV 315.37.

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Chapter CV 439

MALICIOUS PROSECUTION

CV 439.01 **Malicious civil prosecution** ***[Rev. 2-16-13]***

CV 439.03 **Malicious criminal prosecution** ***[Rev. 2-16-13]***

CV 439.05 **Unfair competition by malicious litigation** ***[Rev. 8/14/13]***

CV 439.01 Malicious civil prosecution *[Rev. 2-16-13]*

1. GENERAL. The plaintiff claims that the defendant has engaged in malicious civil prosecution. Malicious civil prosecution is the filing of a civil (lawsuit) (proceeding) against another without probable cause and with malice.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence all of the following:

(A) the malicious filing of a prior (lawsuit) (proceeding) against the plaintiff by the defendant;

(B) the lack of probable cause for the filing of that prior (lawsuit) (proceeding);

(C) the ending of that prior (lawsuit) (proceeding) in the plaintiff's favor; and

(D) the seizure of the plaintiff's (person) (property) during the course of the prior (lawsuit) (proceeding).

COMMENT

Drawn from *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 1996-Ohio-189; *Crawford v. Euclid Natl. Bank*, 19 Ohio St.3d 135 (1985).

3. MALICE. "Malice" means the state of mind under which a person intentionally does a wrongful act without a reasonable lawful excuse and with the intent to inflict injury. The existence of malice must be determined from all of the facts and circumstances in evidence. Malice may be inferred from the lack of probable cause.

COMMENT

Drawn from *Criss v. Springfield Twp.*, 56 Ohio St.3d 82 (1990); *Huber v. O'Neill*, 66 Ohio St.2d 28 (1981).

4. PROBABLE CAUSE. "Probable cause" means a reasonable belief, supported by trustworthy information and circumstances, that the defendant's prior (lawsuit) (proceeding) was legally just and proper. The relevant information and circumstances are those actually known or reasonably within the contemplation of the defendant. If you find that the defendant had probable cause to believe that the prior (lawsuit) (proceeding) was legally just and proper at the time of filing, then the plaintiff cannot recover.

COMMENT

Drawn from *Huber v. O'Neill*, 66 Ohio St.2d 28 (1981); *Baryak v. Kirkland*, 137 Ohio App.3d 704 (11th Dist. 2000); *Evans v. Smith*, 97 Ohio App.3d 59 (1st Dist. 1994).

If the defendant did have probable cause to institute the prior proceeding, then the appropriate claim for relief may be abuse of process. *See* OJI-CV 435.01.

5. AFFIRMATIVE DEFENSE.

(A) GENERAL. OJI-CV 303.03 § 4.

(B) ADVICE OF COUNSEL. The defendant claims that he/she/it brought the prior (lawsuit) (proceeding) relying upon the advice of counsel. To establish this defense, the defendant must prove by the greater weight of the evidence that

(1) he/she/it fully and fairly informed counsel of all the material facts; and

(2) he/she/it followed his/her/its counsel's advice in good faith.

(C) ERROR BY COUNSEL (ADDITIONAL). The fact that the counsel's advice was unsound or wrong will not deprive the defendant of this defense if the defendant relied in good faith on that advice.

(D) DEFINITIONS:

(1) GOOD FAITH. "Good faith" means honesty in belief or purpose.

(2) MATERIAL FACTS. "Material facts" mean facts relevant to counsel's determination that the prior (lawsuit) (proceeding) was warranted and supported by probable cause.

COMMENT

Drawn from *Reenan v. Klein*, 3 Ohio App.3d 142 (1981); *Ashcraft v. Lodge*, 118 Ohio App. 506 (1st Dist. 1963); *but see Runyon v. Columbus S. Power Co.*, 10th Dist. No. 94APE11-1656 (June 27, 1995) (observing that advice of in-house counsel, even if erroneous, could protect both the employee/agent and the employer/principal from liability).

6. CONCLUSION. OJI-CV Chapter 313.

7. CONCLUSION WITH AFFIRMATIVE DEFENSE. If you find by the greater weight of the evidence that the defendant made full and fair disclosure of all the material facts and in good faith relied on the advice of his/her/its counsel, then you must find for the defendant. If the defendant did not fully and fairly inform his/her/its counsel of all the material facts or did not in good faith rely on his/her/its counsel's advice, you must find for the plaintiff if the plaintiff has proved the claim by the greater weight of the evidence.

8. PROXIMATE CAUSE. OJI-CV 405.01.

9. COMPENSATORY DAMAGES. OJI-CV Chapter 315.

10. PUNITIVE DAMAGES. OJI-CV 315.37.

CV 439.03 Malicious criminal prosecution ***[Rev. 2-16-13]***

1. GENERAL. The plaintiff claims that the defendant has engaged in malicious criminal prosecution. Malicious criminal prosecution is the institution or continuation of criminal prosecution against another without probable cause and with malice.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence all of the following:

(A) the malicious institution or continuation of criminal prosecution against the plaintiff by the defendant;

(B) the lack of probable cause for the institution or continuation of the criminal prosecution; and

(C) the termination of the prosecution in the plaintiff's favor.

COMMENT

Drawn from *Froehlich v. Ohio Dept. of Mental Health*, 114 Ohio St.3d 286, 2007-Ohio-4161; *Trussell v. Gen. Motors Corp.*, 53 Ohio St.3d 142 (1990); *see also Robb v. Chagrin Lagoons Yacht Club*, 75 Ohio St.3d 264, 1996-Ohio-189 (distinguishing civil from criminal malicious prosecution).

3. MALICE. "Malice" means the prosecution was instituted or continued for an improper purpose, or any purpose other than the legitimate interest of bringing an offender to justice. Malice may be inferred from the lack of probable cause.

COMMENT

Drawn from *Criss v. Springfield Twp.*, 56 Ohio St.3d 82 (1990); *Huber v. O'Neill*, 66 Ohio St.2d 28 (1981).

4. PROBABLE CAUSE. "Probable cause" means a reasonable belief, supported by trustworthy information and circumstances, that the plaintiff was guilty of the offense(s) with which he/she was charged. The relevant information and circumstances are those actually known or reasonably within the contemplation of the defendant. If you find that the defendant had probable cause to believe that the plaintiff was guilty of the offense(s) with which he/she was charged, then the plaintiff cannot recover.

COMMENT

Drawn from *Huber v. O'Neill*, 66 Ohio St.2d 28 (1981); *Baryak v. Kirkland*, 137 Ohio App.3d 704 (11th Dist. 2000); *Evans v. Smith*, 97 Ohio App.3d 59 (1st Dist. 1994).

If the defendant did have probable cause to institute the prior proceeding, then the appropriate claim for relief may be abuse of process. *See* OJI-CV 435.01.

5. TERMINATION IN PLAINTIFF'S FAVOR. Criminal proceedings were terminated in plaintiff's favor when there was

(Use appropriate alternative)

(A) a discharge at a preliminary hearing;

(or)

(B) the refusal of a grand jury to indict;

(or)

(C) the formal abandonment of the proceedings by the public prosecutor;

(or)

(D) the quashing of an indictment or information;

(or)

(E) an acquittal;

(or)

(F) a final order in favor of the plaintiff by a trial or appellate court.

COMMENT

Drawn from *Froehlich v. Ohio Dept. of Mental Health*, 114 Ohio App.3d 286, 2007-Ohio-4161.

6. AFFIRMATIVE DEFENSE.

(A) GENERAL. OJI-CV 303.03 § 4.

(B) ADVICE OF COUNSEL. The defendant claims that he/she/it instituted or continued the prosecution in reliance upon the advice of counsel. To establish this defense, the defendant must prove by the greater weight of the evidence that

(1) he/she/it fully and fairly informed counsel of all the material facts; and

(2) he/she/it followed his/her/its counsel's advice in good faith.

(C) ERROR BY COUNSEL (ADDITIONAL). The fact that the counsel's advice was unsound or wrong will not deprive the defendant of this defense if the defendant relied in good faith on that advice.

(D) DEFINITIONS.

(1) GOOD FAITH. "Good faith" means honesty in belief or purpose.

(2) MATERIAL FACTS. "Material facts" mean facts relevant to counsel's determination that the institution or continuation of the criminal prosecution was warranted and supported by probable cause.

COMMENT

Drawn from *Reenan v. Klein*, 3 Ohio App.3d 142 (1st Dist. 1981); *Ashcraft v. Lodge*, 118 Ohio App. 506 (1st Dist. 1963); *but see Runyon v. Columbus S. Power Co.*, 10th Dist. No. 94APE11-1656 (June 27, 1995) (observing that advice of in-house counsel, even if erroneous, could protect both the employee/agent and the employer/principal from liability).

7. CONCLUSION. OJI-CV Chapter 313.

8. CONCLUSION WITH AFFIRMATIVE DEFENSE. If you find by the greater weight of the evidence that the defendant made full and fair disclosure of all the material facts and in good faith relied on the advice of his/her/its attorney, then you must find for the defendant. If the defendant did not fully and fairly inform his/her/its counsel of all the material facts or did not in good faith rely on his/her/its attorney's advice, you must find for the plaintiff if the plaintiff has proved the claim by the greater weight of the evidence.

9. PROXIMATE CAUSE. OJI-CV 405.01.

10. COMPENSATORY DAMAGES. OJI-CV Chapter 315.

11. PUNITIVE DAMAGES. OJI-CV 315.37.

CV 439.05 Unfair competition by malicious litigation *[Rev. 8/14/13]*

1. GENERAL. The plaintiff claims that the defendant engaged in unfair competition by way of malicious litigation. To successfully establish an unfair competition claim based upon legal action, the plaintiff must prove that the legal action was objectively baseless and that the defendant had the subjective intent to injure the plaintiff's ability to be competitive.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence all of the following:

(A) the defendant was a business competitor of the plaintiff;

(B) the legal action initiated by the defendant was objectively baseless;

(C) the defendant had the subjective intent to injure the plaintiff's ability to be competitive; and

(D) the plaintiff was damaged as a proximate result of the legal action.

COMMENT

Drawn from *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193 (plurality opinion). Unfair competition by way of malicious litigation differs from malicious prosecution and abuse of process. *See* OJI-CV 439.01, OJI-CV 439.03. The tort of malicious prosecution requires the seizure of the plaintiff's person or property during the course of the prior lawsuit. *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 1996-Ohio-189. The tort of abuse of process requires that the defendant brought a suit with probable cause but for an ulterior purpose for which the suit was not designed. *Id.* The tort of unfair competition by malicious litigation can only take place between business competitors. *Am. Chem. Soc.*, 133 Ohio St.3d 366, 2012-Ohio-4193.

3. OBJECTIVELY BASELESS. A lawsuit is objectively baseless if no reasonable litigant could realistically expect success on the merits.

COMMENT

Drawn from *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) as cited in *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193 (plurality opinion).

4. SUBJECTIVE INTENT. The baseless lawsuit concealed an attempt to interfere directly with the plaintiff's ability to be competitive in the market.

5. AFFIRMATIVE DEFENSE. OJI-CV 303.03 § 4.

COMMENT

The Committee believes that any affirmative defense must be other than the "*Noerr-Pennington* Doctrine," which has been absorbed into the objectively baseless element. In defining this tort, a plurality of the Ohio Supreme Court drew from, but modified, case law dealing with antitrust claims, which must be affirmatively proven *after Noerr-Pennington* immunity is defeated. In antitrust cases, immunity is defeated only by proving that the suit was objectively baseless

and an attempt to interfere directly with the business relationships of a competitor. *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193 (plurality opinion); *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993).

6. CONCLUSION. OJI-CV Chapter 313.
7. DAMAGES. OJI-CV Chapter 315.
8. PUNITIVE DAMAGES. OJI-CV 315.37.

(Text continued on page 389)

Chapter CV 441

FALSE ARREST

CV 441.01 False arrest *[Rev. 2/1/20]*

CV 441.01 False arrest *[Rev. 2/1/20]*

COMMENT

The tort of malicious prosecution is entirely distinct from that of false arrest. Malicious prosecution remedies detention accompanied not by absence of legal process, but by wrongful institution of legal process. False arrest requires no malicious intent, but merely an intrusion into a protected right. *Amine v. King*, E.D.Mich. No. 09-13454 (Sept. 21, 2011); *Harvey v. Horn*, 33 Ohio App.3d 24 (10th Dist.1986). *See* OJI-CV Chapter 439.

1. GENERAL. The plaintiff claims that he/she was falsely (arrested) (detained) (restrained) (imprisoned) by the defendant(s).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the plaintiff was deprived of his/her physical liberty without (legal) (lawful) justification.

COMMENT

Koss v. Kroger Co., 10th Dist. Franklin No. 07AP-450, 2008-Ohio-2696.

False arrest does not require proof of malice, motive, or lack of probable cause. Although the tort of false arrest does not require proof of lack of probable cause, the issue of probable cause remains significant in a false arrest case because its existence renders the arrest lawful. *Koss v. Kroger Co.*, 10th Dist. Franklin No. 07AP-450, 2008-Ohio-2696, citing *Hinkle v. Columbus*, 10th Dist. Franklin No. 04AP-1195, 2006-Ohio-1522. Probable cause should be instructed as an affirmative defense.

3. LEGAL JUSTIFICATION. "Legal justification" exists when the activities during an investigative detention reasonably relate to the circumstance(s) that justified the stop.

COMMENT

Legal justification is different than probable cause. *Amine v. King*, E.D.Mich. No. 09-13454, (Sept. 21, 2011).

The Supreme Court of Ohio has not interpreted police powers more narrowly than the standards mandated by the Constitution of the United States. While the General Assembly has enacted an entire chapter of the Ohio Revised Code on the subject of arrest and detention (R.C. Chapter 2935), it has not set forth specific guidelines for unlawful detentions, which are less intrusive than full-scale arrests in places other than mercantile establishments, libraries, museums, and other archival institutions. Thus, the guidelines for determining lawful and unlawful detentions come from federal constitutional law. *Harvey v. Horn*, 33 Ohio App.3d 24 (10th Dist.1986).

4. AUTHORITY TO ARREST.

COMMENT

A proper warrant issued by a court of law is a complete defense to an action for false arrest filed against a law enforcement officer. *Aaron v. Venator Group*, 6th Dist. Erie No. E-03-001, 2003-Ohio-4858, citing *McFarland v. Shirkey*, 106 Ohio App. 517 (6th Dist.1958).

A finding later in time that an otherwise proper arrest was not justified does not render it "void" from its inception. *Aaron v. Venator Group*, 6th Dist. Erie No. E-03-001, 2003-Ohio-4858; *Harvey v. Horn*, 33 Ohio App.3d 24 (10th Dist.1986).

The authority to make an arrest in Ohio is largely dependent upon the nature of the offense and the circumstance under which it took place.

(*Use appropriate alternative*)

(A) LAW ENFORCEMENT OFFICER—CRIME IN PRESENCE. A (police officer) (sheriff's deputy) (*describe other law enforcement officer*) shall arrest without a warrant a person found to be committing a crime in his/her presence and within that law enforcement official's jurisdiction.

COMMENT

R.C. 2935.03(A)(1). See this section for a complete list of other law enforcement officers.

(B) LAW ENFORCEMENT OFFICER—OFFENSES OF VIOLENCE. A (police officer) (sheriff's deputy) (*describe other law enforcement officer*), when there is reasonable ground to believe an offense of violence has been committed, shall arrest without a warrant a person whom the law enforcement official has reasonable cause to believe is guilty of the violation and is within that law enforcement official's jurisdiction.

COMMENT

R.C. 2935.03 (B)(1). *See* R.C. 2935.03(A)(1) for a complete list of other law

enforcement officers. *See* R.C. 2935.03(B)(1) for a complete list of qualifying offenses of violence.

(C) LAW ENFORCEMENT OFFICER—ALCOHOL RELATED OFFENSES. A (police officer) (sheriff's deputy) (*describe other law enforcement officer*) may arrest and detain a person whom he/she has reasonable grounds to believe violated R.C. 4506.15 (alcohol and other prohibitions) (*describe the violation*) or R.C. 4511.19 (operation while under the influence of alcohol) (*describe the violation*) and has reasonable cause to believe is guilty of the violation and is within that law enforcement official's jurisdiction.

COMMENT

R.C. 2935.03(C). *State v. Craig*, 7th Dist. Columbiana No.18CO 0040, 2019-Ohio-4962.

See R.C. 2935.03(A)(1) for a complete list of other law enforcement officers.

(D) PRIVATE PERSON. When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he/she has reasonable cause to believe is guilty of the offense.

COMMENT

R.C. 2935.04.

Making a citizen's arrest is an affirmative defense. Where authorized to make an arrest pursuant to R.C. 2935.04, a private person, prior to attempting the arrest, must inform the person to be arrested of the intention to arrest and of the cause of the arrest unless such cause is contemporaneous with the arrest. R.C. 2935.07; *State v. Rogers*, 43 Ohio St.2d 28 (1975).

(E) MERCHANT—SHOPLIFTING. A merchant, or an employee or agent of a merchant, who has probable cause to believe that items offered for sale by a merchant have been unlawfully taken may detain a person in a reasonable manner for a reasonable length of time within the establishment or its immediate vicinity to recover the property, to contact law enforcement, or to obtain a warrant of arrest.

COMMENT

R.C. 2935.041. This instruction can be modified to cover protection of a library, museum, archival institution, or motion picture piracy in a facility in which a motion picture is shown. The question as to what constitutes an unreasonable detention is one for the jury to decide under the facts and circumstances of each particular case. *Tucker v. Kroger Co.*, 133 Ohio App.3d 140 (10th Dist.1999).

5. MINOR MISDEMEANOR (ADDITIONAL). A law enforcement officer shall issue a citation for the commission of a minor misdemeanor unless the offender 1) requires medical care or is unable to provide for his own safety; or 2) will not provide satisfactory evidence of his/her identity; or refuses to sign the citation; or 3) failed to appear for a previous citation for the commission of that misdemeanor.

COMMENT

Drawn from R.C. 2935.26.

6. ARREST OUTSIDE JURISDICTION (ADDITIONAL). A law enforcement official who may not otherwise arrest or detain a person may do so outside of his/her jurisdiction if all the following apply: the pursuit takes place without unreasonable delay after the offense is committed; the pursuit is initiated in the law enforcement officer's jurisdiction; and the offense is a felony, a misdemeanor of the first or second degree, or an offense for which points are chargeable.

COMMENT

R.C. 2935.03(D).

7. ARREST ESTABLISHED. To establish false arrest, the plaintiff must present evidence to support a finding that the defendant(s) intentionally confined the plaintiff within a limited area, for an appreciable time, without lawful privilege or the plaintiff's consent. If there is no (force) (threat) (display of authority) or if the plaintiff stayed (freely) (voluntarily), then the plaintiff was not falsely arrested.

COMMENT

Ferraro v. Phar-Mor, Inc., 7th Dist. Mahoning No. 98CA48, (Apr. 7, 2000).

8. AFFIRMATIVE DEFENSE.

(A) GENERAL. OJI-CV 303.03 § 4.

(B) PROBABLE CAUSE. The defendant(s) claims that he/she had probable cause to arrest the plaintiff. Probable cause exists when there are facts and circumstances that would cause a reasonable and prudent person to believe that a crime has been committed. Probable cause deals not with certainties, but with probabilities. The burden of proof is upon the defendant(s) to show by the greater weight of the evidence that there was probable cause to believe that the plaintiff had committed the crime of (*describe crime*).

COMMENT

Koss v. Kroger Co., 10th Dist. Franklin No. 07AP-450, 2008-Ohio-2696; *Criss v.*

Springfield Twp., 9th Dist. Summit C.A. Nos. 13262 and 13271, citing *Crawford v. Euclid Natl. Bank*, 19 Ohio St.3d 135 (July 5, 1985).

The issue of probable cause is not dependent upon the ultimate judicial determination of guilt or innocence, which is resolved on a reasonable doubt standard, but whether the individual had probable cause sufficient to authorize the arrest. *Hinkle v. Columbus*, 10th Dist. Franklin No. 04AP-1195, 2006-Ohio-1522; *State v. Williams*, 2d Dist. Montgomery No. CA 16306 (Nov. 21, 1997).

Probable cause to believe that a person has committed any crime will preclude an unlawful arrest claim, even if the person was arrested on additional or different charges for which there was no probable cause. *Amine v. King*, E.D.Mich. No. 09-13454 (Sept. 21, 2011); *Devenpeck v. Alford*, 543 U.S. 146 (2004).

9. CONCLUSION. OJI-CV Chapter 313.

10. CONCLUSION WITH AFFIRMATIVE DEFENSE.

(A) If you find the defendant has proven the existence of probable cause by the greater weight of the evidence, you must find for the defendant.

(B) If you find that the defendant did not prove the existence of probable cause by the greater weight of the evidence, you must find for the plaintiff if the plaintiff proved his/her claim by the greater weight of the evidence.

11. PROXIMATE CAUSE. OJI-CV Chapter 405.

12. DAMAGES. OJI-CV Chapter 315.

13. PUNITIVE DAMAGES. OJI-CV 315.37.

COMMENT

Though motive or malice are not elements of false arrest, if actual malice is proved, punitive damages may be requested. *Burnett v. Sebel*, 106 Ohio App. 86 (1st Dist.1958).

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Chapter CV 443

CIVIL CONSPIRACY

CV 443.01 Civil conspiracy *[Rev. 12-1-07]*

CV 443.01 Civil conspiracy *[Rev. 12-1-07]*

1. PLAINTIFF'S CLAIM. The plaintiff claims that the defendant(s) (injured) (damaged) him/her/it by participating in a civil conspiracy.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the defendant(s) participated in a malicious combination involving two or more persons, including the defendant(s), a result of which was the commission of a/an (wrongful) (unlawful) act that caused (injury) (damage).

COMMENT

Drawn from *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, quoting *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, citing *Minarik v. Nagy* (1963), 8 Ohio App.2d 194.

The unlawful act must be an unlawful act "independent" of the existence of the conspiracy. In other words, there must be an underlying unlawful act actionable in the absence of the conspiracy. *Gosden v. Louis* (1996), 116 Ohio App.3d 195.

3. MALICIOUS COMBINATION. "Malicious combination" means a common understanding or design, whether spoken or unspoken, entered into with malice by two or more persons to commit a/an (wrongful) (unlawful) act. It does not require a showing of an express agreement. It is sufficient that the participants, in any manner, reached a mutual understanding to commit a/an (wrongful) (unlawful) act. (A meeting of the participants is not necessary.)

COMMENT

Drawn from *Gosden v. Louis* (1996), 116 Ohio App.3d 195.

4. MALICE. "Malice" is that state of mind under which a person does a/an

(wrongful) (unlawful) act (purposely) (intentionally), without a reasonable or lawful excuse, that causes injury.

COMMENT

Drawn from *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 1998-Ohio-294.

5. (WRONGFUL) (UNLAWFUL) ACT. Proof that an underlying (wrongful) (unlawful) act was committed is required before the plaintiff can prevail on his/her/its civil conspiracy claim. The (wrongful) (unlawful) act that the plaintiff claims in this case is (*describe the wrongful or unlawful act and instruct on the applicable elements, definitions, and affirmative defenses*).

COMMENT

The Committee believes that use of the term "wrongful act" can be used interchangeably with "unlawful act" because the case law defines "unlawful act" as a tort. *Avery v. Rossford* (2001), 145 Ohio App.3d 155.

6. PROXIMATE CAUSE. OJI-CV 405.01.

7. CONCLUSION. OJI-CV Chapter 313.

8. DAMAGES. OJI-CV Chapter 315.

Chapter CV 445

RICO

CV 445.01	Civil action; introduction
CV 445.03	Conducting or participating in the affairs of an enterprise; essential elements; burden of proof
CV 445.05	Conducting or participating in the affairs of an enterprise; essential elements; definitions *[Rev. 10/3/15]*
CV 445.07	Conducting or participating in the affairs of an enterprise; causation and damages
CV 445.09	Acquiring or maintaining an interest in an enterprise or real property; essential elements; burden of proof
CV 445.11	Acquiring or maintaining an interest in an enterprise or real property; essential elements; definitions
CV 445.13	Acquiring or maintaining an interest in an enterprise or real property; causation and damages
CV 445.15	Use or investment of proceeds in the acquisition of real property, or establishment or operation of an enterprise; essential elements; burden of proof
CV 445.17	Use or investment of proceeds in the acquisition of real property, or establishment or operation of an enterprise; essential elements; definitions
CV 445.19	Use or investment of proceeds in the acquisition of real property, or establishment or operation of an enterprise; causation and damages
CV 445.21	Conspiracy to engage in a pattern of corrupt activity or the collection of an unlawful debt; essential elements; burden of proof
CV 445.23	Conspiracy to engage in a pattern of corrupt activity or the collection of an unlawful debt; essential elements; definitions
CV 445.25	Conspiracy to engage in a pattern of corrupt activity or the collection of an unlawful debt; causation and damages

CV 445.01 Civil action; introduction

COMMENT

The court must decide what cause(s) of action is (are) asserted by plaintiff, as a matter of law, and instruct the jury accordingly. A plaintiff may assert one or more of the following causes of action:

(A) conducting or participating in, directly or indirectly, the affairs of an enterprise through a pattern of corrupt activity or the collection of an unlawful debt, R.C. 2923.34 and 2923.32(A)(1). See OJI-CV 445.03, OJI-CV 445.05 and OJI-CV 445.07.

(B) acquiring or maintaining, directly or indirectly, any interest in or control of, any enterprise or real property through a pattern of corrupt activity or the collection of an unlawful debt, R.C. 2923.34 and 2923.32(A)(2). See OJI-CV 445.09, OJI-CV 445.11 and OJI-CV 445.13.

(C) use or investment of any proceeds, parts of proceeds and/or proceeds derived from such proceeds, directly or indirectly, from a pattern of corrupt activity or the collection of an unlawful debt, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise, R.C. 2923.34 and 2923.32(A)(3). See OJI-CV 445.15, OJI-CV 445.17 and OJI-CV 445.19.

(D) conspiracy to commit any of the activities set forth in (A) through (C) above, R.C. 2923.34. See OJI-CV 445.21, OJI-CV 445.23 and OJI-CV 445.25.

The following introductory instruction is pertinent to the causes of action set forth in (A) through (C) above and, as shown by the matter contained in parentheses, may be modified for a cause of action based on conspiracy.

1. INTRODUCTION. This action is brought by plaintiff to recover damages claimed to have been caused by defendant's (engaging) (conspiring to engage) in a pattern of corrupt activity.

CV 445.03 Conducting or participating in the affairs of an enterprise; essential elements; burden of proof

1. ESSENTIAL ELEMENTS. To recover actual damages on his claim, plaintiff must prove, by a greater weight of the evidence, that:

(A) Defendant was a person;

(B) Defendant was employed by or associated with an enterprise;

(C) Defendant conducted or participated in, directly or indirectly, the affairs of the enterprise;

(*Use appropriate alternative*)

(1) (Through a pattern of corrupt activity), or

(2) (Through the collection of an unlawful debt); and

(D) Plaintiff was damaged, directly or indirectly, as a result of defendant's conduct.

COMMENT

R.C. 2923.32(A)(1). Damages may include, but are not limited to, competitive injury and injury distinct from that inflicted by the corrupt activity. R.C. 2923.34. Note that injury may be directly or indirectly caused. If there is evidence that the injury was "indirectly" caused, the word indirectly must be added to the definition of proximate cause. OJI-CV 405.01 § 2.

2. PREPONDERANCE OF THE EVIDENCE. OJI-CV 303.05.

3. TRIPLE DAMAGES. Plaintiff also seeks triple the actual damages. To recover triple damages, plaintiff must establish each element of his claim, including the amount of actual damages, by clear and convincing evidence.

COMMENT

R.C. 2923.34(F) provides that a plaintiff may recover triple damages if the violation or the conspiracy and the actual damages are established by clear and convincing evidence. If triple damages are sought, the foregoing instruction should be given.

4. CLEAR AND CONVINCING EVIDENCE. OJI-CV 303.07.

5. SUMMARY. To recover actual damages, the plaintiff must prove his claim by a greater weight of the evidence. However, to recover triple the actual damages, the plaintiff must prove his claim including actual damages by clear and convincing evidence. You may return a verdict for either actual damages or triple the actual damages depending on whether plaintiff has proved his claim by a greater weight of the evidence or by clear and convincing evidence. If you find the plaintiff has failed to prove any element of his claim by a greater weight of the evidence you shall return a verdict for the defendant.

CV 445.05 Conducting or participating in the affairs of an enterprise; essential elements; definitions *[Rev. 10/3/15]*

1. PERSON. The term "person" includes an individual, corporation, business trust, estate, trust, partnership, and association or any governmental officer, employee, or entity.

COMMENT

R.C. 2923.31(G) and 1.59.

2. ENTERPRISE. The term "enterprise" includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. Enterprise also includes (illicit) (unlawful) as well as (licit) (lawful) enterprises.

COMMENT

R.C. 2923.31(C).

In *State v. Beverly*, 143 Ohio St.3d 258, 2015-Ohio-219, the Supreme Court of Ohio decided that the existence of an enterprise can be established without proving that the enterprise was a structure separate and distinct from a pattern of corrupt activity. *See also State v. Griffin*, 141 Ohio St.3d 392, 2014-Ohio-4767.

It is unclear whether the "person" element may also be the same as the "enterprise" element under any of the civil claims for relief for engaging in a pattern of corrupt activity. Under 18 U.S.C. § 1962(c), the statute upon which R.C. 2923.32(A)(1) is premised, it is unclear whether the "person" may be the same as the "enterprise." See *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *certiorari denied* (1983), 459 U.S. 1105, which held that the "person" may not be the "enterprise" for purposes of 18 U.S.C. § 1962(c). But see *United States v. Hartley*, 678 F.2d 961 (4th Cir. 1982), *certiorari denied* (1983,)459 U.S. 1170, which held that the "person" and the "enterprise" may be the same for purposes of 18 U.S.C. § 1962(c).

Under 18 U.S.C. § 1962(b), the statute upon which R.C. 2923.32(A)(2) is premised, courts are also split as to whether the "person" element may be the same as the "enterprise" element. Compare *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393 (9th Cir. 1986), which held that the "person" may be the same as the "enterprise" for purposes of 18 U.S.C. § 1962(b), with *Robinson v. City Colleges of Chicago*, 656 F. Supp. 555 (N.D. ILL. 1981), which held that the "person" may not be the same as the "enterprise" for purposes of 18 U.S.C. § 1962(b).

Under 18 U.S.C. § 1962(a), the statute upon which R.C. 2923.32(A)(3) is premised, it is also unclear whether the "person" element may be the same as the "enterprise" element. See *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393 (9th Cir. 1986), which held that the "person" may be the same as the "enterprise" for purposes of 18 U.S.C. § 1962(a). But see *Rush v. Oppenheimer & Co., Inc.*, 628 F.Supp. 1188 (S.D.N.Y. 1985), which held that the "person" may not be the same as the "enterprise" for purposes of 18 U.S.C. § 1962(a).

Finally, at least one court has held that the "person" element may be the same as the "enterprise" element for purposes of 18 U.S.C. § 1962(d), the federal conspiracy section. See *Onesti v. Thomson McKinnon Sec., Inc.*, 619 F.Supp. 1262 (N.D.Ill. 1985).

For a thorough discussion of the "person" and "enterprise" issues, see Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982).

3. CONDUCT. "Conduct" means to direct.

COMMENT

Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163 (1993).

4. PARTICIPATE IN. "Participate" means to take part in and is not limited to those

who have directed the pattern of corrupt activity. "Participate" encompasses those who have performed activities necessary or helpful to the operation of the enterprise, whether directly or indirectly, without an element of control.

COMMENT

State v. Siferd, 151 Ohio App.3d 103, 2002-Ohio-6801.

5. PATTERN OF CORRUPT ACTIVITY. The term "pattern of corrupt activity" means two or more incidents of corrupt activity that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event. A finding of "pattern of corrupt activity" requires proof of at least two incidents of corrupt activity within six years of each other (excluding any period of imprisonment served by any person engaging in the corrupt activity), one of which must have occurred after January 1, 1986.

COMMENT

R.C. 2923.31(E). The portion of the instruction set forth in parentheses should be given only if applicable. The six-year period set forth in the instruction is inapplicable if one of the incidents of corrupt activity is aggravated murder. Under R.C. 2923.34(B), a "pattern of corrupt activity" cannot be comprised solely of two or more incidents of mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C. § 1343, transportation in interstate commerce of goods, wares, or merchandise of a value of $5,000 or more knowing the same to have been stolen, converted, or taken by fraud under 18 U.S.C. § 2314, federal securities fraud and/or securities fraud in violation of R.C. 1707.042(A)(1) and/or (2) and/or R.C. 1707.44(B), (C)(4), (D), (E) and/or (F). If two or more incidents of any of the foregoing are in evidence, the following limiting instruction should be given.

6. PATTERN OF CORRUPT ACTIVITY—LIMITATION (ADDITIONAL). Although the plaintiff claims (number) incidents of (*describe corrupt activities that standing alone cannot comprise a pattern of corrupt activity*), these incidents alone are insufficient to establish a "pattern of corrupt activity." The plaintiff must prove at least one incident of (*describe incident(s) of corrupt activity alleged other than those subject to the limitations of R.C. 2923.34[B]*) that is related to the affairs of the same enterprise and is not so closely related to any other act of corrupt activity and connected in time and place that the acts constitute a single event.

7. CORRUPT ACTIVITY. The term "corrupt activity" means:

(*Use appropriate alternative[s]*)

(A) engaging in

(*or*)

(B) attempting to engage in

(*or*)

(C) conspiring to engage in

(*or*)

(D) soliciting, coercing or intimidating another person to engage in (*describe the conduct or violation by reading or summarizing applicable law as listed in R.C. 2923.31[I]*).

COMMENT

R.C. 2923.31(I). When incidents of corrupt activity under R.C. 2923.31(I)(2)(b) and/or (c) are alleged, the financial limitations set forth in those sections should be read or summarized as well.

8. UNLAWFUL DEBT. The term "unlawful debt" means any money or other thing of value constituting principal or interest of a debt that is legally unenforceable in this state in whole or in part because the debt was incurred or contracted in violation of any federal or state law relating to the business of gambling activity or relating to the business of lending money at an usurious rate.

COMMENT

R.C. 2923.31(L). Depending on the issue in evidence, instructions may have to be drawn to explain unenforceable gambling or usury injury. See OJI-CV 445.03, OJI-CV 445.05 and OJI-CV 445.07.

The creditor of a debt alleged to be unlawful because of usury is provided with a complete defense to the claim by the statute. If this defense is asserted, the jury should be given the following instruction.

9. CREDITOR'S DEFENSE. Defendant claims that the debt in issue in this case was not "unlawful" because it was made in good faith. To prove this defense, defendant must show, by a greater weight of the evidence, that (1) the usurious rate was not intentionally set; and that (2) it resulted from a good faith error by the defendant. The defendant is entitled to establish this defense even though it maintained procedures adopted to avoid such an error.

COMMENT

R.C. 2923.31(L).

(Text continued on page 401)

CV 445.07 Conducting or participating in the affairs of an enterprise; causation and damages

1. PROXIMATE CAUSE. OJI-CV Chapter 405.

COMMENT

The standard instructions on proximate cause may have to be tailored to fit the evidence. See OJI-CV 445.03 § 1 Comment.

2. DAMAGES. OJI-CV Chapter 315.

COMMENT

The standard instructions on damages may have to be tailored to fit the evidence. See OJI-CV 445.03 § 1 Comment.

CV 445.09 Acquiring or maintaining an interest in an enterprise or real property; essential elements; burden of proof

1. ESSENTIAL ELEMENTS. To recover actual damages on his claim, plaintiff must prove, by a greater weight of the evidence, that:

(A) Defendant was a person;

(B) Defendant (acquired) (maintained), directly or indirectly, any (interest in) (control of) (an enterprise) (real property)

(*Use appropriate alternative*)

(1) Through a pattern of corrupt activity, or

(2) Through the collection of an unlawful debt; and

(C) Plaintiff was damaged, directly or indirectly, as a result of defendant's conduct.

COMMENT

R.C. 2923.32(A)(2). See OJI-CV 445.03 § 1 Comment.

2. PREPONDERANCE OF THE EVIDENCE. OJI-CV 303.05.

3. TRIPLE DAMAGES. See OJI-CV 445.03 § 3.

4. CLEAR AND CONVINCING EVIDENCE. OJI-CV 303.07.

5. SUMMARY. See OJI-CV 445.03 § 5.

CV 445.11 Acquiring or maintaining an interest in an enterprise or real property; essential elements; definitions

1. PERSON. See OJI-CV 445.05 § 1.

2. ENTERPRISE. See OJI-CV 445.05 § 2.

3. REAL PROPERTY. The term "real property" means any real property or any interest in real property, including, but not limited to, any lease of, or mortgage upon, real property.

COMMENT

R.C. 2923.31(J). Real property and any beneficial interest in it is deemed to be located where the real property is located.

4. PATTERN OF CORRUPT ACTIVITY. See OJI-CV 445.05 § 4.

5. PATTERN OF CORRUPT ACTIVITY—LIMITATION. See OJI-CV 445.05 § 5.

6. CORRUPT ACTIVITY. See OJI-CV 445.05 § 6.

7. UNLAWFUL DEBT. See OJI-CV 445.05 § 7.

8. CREDITOR'S DEFENSE. See OJI-CV 445.05 § 8.

CV 445.13 Acquiring or maintaining an interest in an enterprise or real property; causation and damages

1. PROXIMATE CAUSE. OJI-CV Chapter 405.

COMMENT

The standard instructions on proximate cause may have to be tailored to fit the evidence. See OJI-CV 445.03 § 1 Comment.

2. DAMAGES. OJI-CV Chapter 315.

COMMENT

The standard instructions on damages may have to be tailored to fit the

evidence. See OJI-CV 445.03 § 1 Comment.

CV 445.15 Use or investment of proceeds in the acquisition of real property, or establishment or operation of an enterprise; essential elements; burden of proof

1. ESSENTIAL ELEMENTS. To recover actual damages on his claim, plaintiff must prove, by a greater weight of the evidence, that:

(A) Defendant was a person;

(B) Defendant received proceeds which defendant knew to be derived, directly or indirectly

(*Use appropriate alternative*)

(1) From a pattern of corrupt activity, or

(2) From the collection of an unlawful debt;

(C) Defendant (used) (invested), directly or indirectly, any part of those proceeds, or any proceeds derived from the use or investment of any of those proceeds, in

(*Use appropriate alternative*)

(1) The acquisition of any title to, or any right, interest, or equity in, real property, or

(2) The establishment or operation of any enterprise; and

(D) Plaintiff was damaged, directly or indirectly, as a result of defendant's conduct.

COMMENT

R.C. 2923.32(A)(3). See OJI-CV 445.03 § 1 Comment.

2. PREPONDERANCE OF THE EVIDENCE. OJI-CV 303.05.

3. TRIPLE DAMAGES. See OJI-CV 445.03 § 3.

4. CLEAR AND CONVINCING EVIDENCE. OJI-CV 303.07.

5. SUMMARY. See OJI-CV 445.03 § 5.

CV 445.17 Use or investment of proceeds in the acquisition of real property, or establishment or operation of an enterprise; essential elements; definitions

1. PERSON. See OJI-CV 445.05 § 1.

2. KNOWINGLY. 4 OJI–CR 417.11.

3. ENTERPRISE. See OJI-CV 445.05 § 2.

4. REAL PROPERTY. See OJI-CV 445.11 § 3.

5. PATTERN OF CORRUPT ACTIVITY. See OJI-CV 445.05 § 4.

6. PATTERN OF CORRUPT ACTIVITY—LIMITATION. See OJI-CV 445.05 § 5.

7. CORRUPT ACTIVITY. See OJI-CV 445.05 § 6.

8. UNLAWFUL DEBT. See OJI-CV 445.05 § 7.

9. CREDITOR'S DEFENSE. See OJI-CV 445.05 § 8.

CV 445.19 Use or investment of proceeds in the acquisition of real property, or establishment or operation of an enterprise; causation and damages

1. PROXIMATE CAUSE. OJI-CV Chapter 405.

COMMENT

The standard instructions on proximate cause may have to be tailored to fit the evidence. See OJI-CV 445.03 § 1 Comment.

2. DAMAGES. OJI-CV Chapter 315.

COMMENT

The standard instructions on damages may have to be tailored to fit the evidence. See OJI-CV 445.03 § 1 Comment.

CV 445.21 Conspiracy to engage in a pattern of corrupt activity or the collection of an unlawful debt; essential elements; burden of proof

1. ESSENTIAL ELEMENTS. To recover actual damages on his claim, plaintiff must prove, by a greater weight of the evidence, that:

(A) Defendant was a person;

(B) The conspiracy existed at or about the time claimed;

(C) Defendant became a member of the conspiracy; that is, the defendant demonstrated by words or actions an agreement to:

(*Use appropriate alternative*)

(1) (Conduct) (participate in), directly or indirectly, the affairs of an enterprise, through (a pattern of corrupt activity) (the collection of an unlawful debt); or

(2) (Acquire) (maintain), directly or indirectly, any (interest in) (control of) (an enterprise) (real property) through (a pattern of corrupt activity) (the collection of an unlawful debt); or

(3) (Use) (invest), directly or indirectly, any part of any proceeds knowingly derived, directly or indirectly, from (a pattern of corrupt activity) (the collection of an unlawful debt), or any proceeds derived from the (use) (investment) of any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, (real property) (the establishment or operation of any enterprise);

(D) One or more members of the conspiracy committed, in furtherance of some object or purpose of the conspiracy, (*describe one or more of the overt acts claimed*); and

(E) Plaintiff was damaged, directly or indirectly, as a result of the conspiracy.

COMMENT

R.C. 2923.34(B). The Committee believes that the reference to "allegedly conspired" refers only to the injunctive relief provided by division (C).

CV 445.23 Conspiracy to engage in a pattern of corrupt activity or the collection of an unlawful debt; essential elements; definitions

1. PERSON. See OJI-CV 445.05 § 1.

2. CONSPIRACY. OJI-CR 523.01.

COMMENT

The standard instructions on conspiracy may have to be tailored to fit the evidence.

3. KNOWINGLY. OJI–CR 417.11.

4. ENTERPRISE. See OJI-CV 445.05 § 2.

5. REAL PROPERTY. See OJI-CV 445.11 § 3.

6. PATTERN OF CORRUPT ACTIVITY. See OJI-CV 445.05 § 4.

7. PATTERN OF CORRUPT ACTIVITY-LIMITATION. See OJI-CV 445.05 § 5.

8. CORRUPT ACTIVITY. See OJI-CV 445.05 § 6.

9. UNLAWFUL DEBT. See OJI-CV 445.05 § 7.

10. CREDITOR'S DEFENSE. See OJI-CV 445.05 § 8.

11. OVERT ACT. OJI–CR 523.01 § 5.

COMMENT

The standard instructions on overt act may have to be tailored to fit the evidence.

CV 445.25 Conspiracy to engage in a pattern of corrupt activity or the collection of an unlawful debt; causation and damages

1. PROXIMATE CAUSE. OJI-CV Chapter 405.

COMMENT

The standard instructions on proximate cause may have to be tailored to fit the evidence. See OJI-CV 445.03 § 1 Comment.

2. DAMAGES. OJI-CV Chapter 315.

COMMENT

The standard instructions on damages may have to be tailored to fit the evidence. See OJI-CV 445.03 § 1 Comment.

Chapter CV 447

CONCEALED OR EMBEZZLED ASSETS

CV 447.01 Complaint, definitions, defenses, conclusion

COMMENT

R.C. 2109.50, 2109.51, 2109.52 provide for an action in Probate Court to recover the assets of a trust estate and to obtain a judgment against persons found guilty of concealment or embezzlement. It is the opinion of the Committee that though criminal terminology is used, the action is civil in nature.

CV 447.01 Complaint, definitions, defenses, conclusion

1. The plaintiff claims the defendant (concealed) (embezzled) (conveyed away) (was in the wrongful possession of) (monies) (chattels) (choses in action) (*describe*), the property of (name of owner). Before you can find for the plaintiff, you must find by the greater weight of the evidence that:

(A) The (assets were) (property was) owned by (name of owner).

(B) The defendant (received) (obtained) the (assets) (property) and (concealed them) (embezzled them) (conveyed them away) (held them in his/her possession), and his/her conduct was knowingly wrongful.

COMMENT

Ukrainiec v. Batz (1982), 24 Ohio App.3d 200, 493 N.E.2d 1368.

2. DEFINITIONS.

(A) MONIES. "Monies" means cash, gold, silver or paper money used as medium of exchange.

(B) CHATTELS. "Chattels" are articles of personal property.

(C) CHOSES IN ACTION. A "chose in action" is a right to receive or recover a debt, demand, or damages in a court of law.

(D) CONCEAL. "Conceal" means to hide, secrete or keep from the discovery or observation of others.

(E) EMBEZZLE. "Embezzle" means to keep or use (money) (chattels) (choses in action) (property) (*describe*) intrusted to a person by (another).

(F) CONVEY AWAY. "Convey away" means to transfer or deliver ownership or possession to another.

(G) KNOWINGLY. A person acts knowingly when he/she is aware that his/her conduct (will probably cause a certain result) (will probably be of a certain nature). Since you cannot look into the mind of another, (knowledge) (whether a person acted knowingly) is determined from all the facts and circumstances.

(H) WRONGFUL. "Wrongful" means injurious, unjust, or unfair. A wrongful act is one which violates the rights of another.

3. DEFENSES.

COMMENT

The Committee has not determined whether circumstances which would negate elements of the accusation are affirmative defenses and issues on which the defendant has the burden of proof or merely circumstances, such as "alibi" in the criminal law, which the plaintiff has the burden to overcome by the greater weight of the evidence.

The defendant claims that he was (given) (authorized to use) (authorized to hold or convey) (*specify defense*) the property.

4. CONCLUSION. If you find that the (plaintiff) (complainant) proved by the greater weight of the evidence both elements of this claim, your verdict must be guilty. If you find that the (plaintiff) (complainant) failed to prove either element, your verdict must be not guilty.

5. PENALTY. Your sole function is to decide whether the defendant is guilty or not guilty. The court has the duty to render a final judgment.

Chapter CV 449

FRAUD

CV 449.01	Introduction; fraud defined
CV 449.03	Elements of fraud
CV 449.05	Types of representations not fraudulent
CV 449.07	Expert expressions of opinion
CV 449.09	Duty to investigate, inspect
CV 449.11	Duty to speak—partial disclosure
CV 449.13	*Caveat emptor* in real estate sales
CV 449.15	Damages
CV 449.17	Conclusion

CV 449.01 Introduction; fraud defined

1. INTRODUCTION. The plaintiff claims that the defendant(s) committed certain fraudulent acts against the plaintiff, upon which plaintiff relied to his damage.

Specifically, the plaintiff claims (*describe*):

. . . . . .

The defendant (denies) (claims) (*describe*):

. . . . . .

2. FRAUD DEFINED. Fraud is a civil wrong. It is a deception practiced with a view to gaining an unlawful or unfair advantage.

COMMENT

Isaac v. American Sur. Co. (1939), 61 Ohio App. 47, 15 O.O. 66, 22 N.E.2d 280.

ADDITIONAL. Fraud is a false representation of fact, whether by words, conduct or concealment which misleads and is intended to mislead another so that he relies on it to his injury.

CV 449.03 Elements of fraud

1. ELEMENTS. The plaintiff must prove by the greater weight of the evidence each of the following elements:

(*Use appropriate alternative*)

(A)(1) A false representation of fact was made with knowledge of its falsity or with utter disregard and recklessness about its falsity that knowledge may be (concluded) (found).

(*or*)

(A)(2) A knowing concealment of fact which was done (when) (where) there was a duty to disclose.

(*and*)

(B) The (representation) (concealment) was material to the transaction.

(C) The (representation) (concealment) was made with the intent of misleading plaintiff into relying upon it.

(D) The plaintiff was justified in relying on the (representation) (concealment), and did, in fact, so rely.

(E) The plaintiff was injured and the injury was (proximately) (directly) caused by his reliance on the (representation) (concealment).

COMMENT

Burr v. Stark Cty. Bd. of Commrs. (1986), 23 Ohio St. 3d 69, 491 N.E.2d 1101; *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 514 N.E.2d 709; *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, at 169, 462 N.E.2d 407. Refer to OJI-CV 311.03 § 2 for elements not in dispute.

2. MATERIAL REPRESENTATION. The representation must be material; that is, it must be important, necessary or having influence on the transaction. It must be so substantial and important that it influenced the person (to whom it was made) (from whom it was concealed).

COMMENT

In Ohio, the materiality of false representation has been held to be a jury question. *J.B. Colt Co. v. Wasson* (1922), 15 Ohio App. 484, 32 Ohio C.C.(N.S.) 369; *Northwestern Mut. Life Ins. Co. v. Risley* (1901), 22 Ohio C.C. 160, 12 Ohio C.D. 186.

3. FALSE. A representation is false when it is not substantially true. The truth or falsity of a representation depends on the natural and obvious meanings of the words taking into consideration all the surrounding circumstances.

4. KNOWLEDGE. A person knows a representation is false when he is aware it is not substantially true.

5. RECKLESS. A representation is made with utter disregard and recklessness when the person who makes the representation is (totally) (completely) careless or indifferent to the consequences or the risk that the representation will cause the person to whom it is made to do or not do certain things. If a person has no knowledge of fact, but asserted it as true when it was false, you may find that he made the representation with utter disregard and recklessness. A representation recklessly made without knowledge of the truth is the same as a false representation knowingly made.

6. DUTY TO DISCLOSE.

COMMENT

The existence of a duty to disclose depends on the existence of a relationship of trust and confidence, which in turn may be a question of fact in some situations and a question of law in other situations. The variety of duty to disclose situations is such that it is not feasible to create pattern instructions.

For an instruction on *caveat emptor,* see OJI-CV 449.13.

7. INTENT TO MISLEAD. A person intends to mislead another to rely on a representation when it is his purpose to mislead. A person's intent is known only to himself unless he expresses it to others or indicates it by his conduct. Intent is determined from the way in which the representation is made, the means used and all the facts and circumstances in evidence.

8. JUSTIFIABLE RELIANCE. There is a justifiable reliance in a (representation) (concealment) when a person of ordinary care would rely on it under the same or similar circumstances.

9. RESULTING DAMAGE. The plaintiff must be directly damaged by the reliance on the (representation) (concealment). This means that the damage was caused by the (representation) (concealment) in a natural and continuous sequence and without which the damage would not have occurred.

10. BURDEN OF PROOF. OJI-CV 303.03.

COMMENT

The degree of proof necessary to show fraud in a civil action for money damages is a preponderance of the evidence. *Household Finance Corp. v. Altenberg* (1966), 5 Ohio St.2d 190, 34 O.O.2d 348, 214 N.E.2d 667, syllabus; *Manning v. Len Immke Buick, Inc.* (1971), 28 Ohio App.2d 203, 57 O.O.2d 308, 276 N.E.2d 253. See OJI-CV 303.03.

The degree of proof on contracts within the statute of frauds or to set aside a document for fraud is clear and convincing evidence. *Cross v. Ledford* (1954), 161 Ohio St. 469, 53 O.O. 361, 120 N.E.2d 118. See OJI-CV 303.07.

11. PREPONDERANCE. OJI-CV 303.05.

12. PROXIMATE CAUSE, CAUSATION. OJI-CV 405.01.

CV 449.05 Types of representations not fraudulent

COMMENT

While historically, the elements of fraud have been fairly well fixed for many years, the defenses to fraud, what is not fraud, and damages for fraud are not fixed. The Committee has attempted to make a pattern instruction of only a few of the situations.

1. FUTURE ACT. Generally, fraud must be based on a false representation of a present or past fact. The exception to this rule is when the promise to perform a future act is made with the present intent by the (plaintiff) (defendant) not to perform. For example, if a purchaser has no expectation of being able to pay for goods or services, it is the same as an intention not to pay. The burden to prove such an intention is on the one claiming fraud.

2. OPINIONS. Expressions of opinions, even though false, are not a basis for fraud.

COMMENT

If there is a confidential or fiduciary relationship, such expressions if known to be false can be fraudulent. *Smith v. Patterson* (1877), 33 Ohio St. 70; *Shawnee Commercial & Sav. Bank Co. v. Miller* (1903), 1 Ohio C.C.(N.S.) 569, 14 Ohio C.D. 198. Also, if the expression of opinion is that of an expert, it may be fraudulent. OJI-CV 449.07.

3. LAW. Everyone is presumed to know the law and representations as to the law are mere opinions and not fraud.

COMMENT

But see, 37 American Jurisprudence 2d (1968), Fraud and Deceit, Section 77.

4. PUFFING. Boastful assertions or highly exaggerated descriptions or claims are puffing or bragging and are not false representation, which would constitute fraud. It is sometimes called dealer's talk or trade talk.

CV 449.07 Expert expressions of opinion

1. PROFESSIONAL EXPRESSIONS. Ordinarily expressions of opinion, even

though false, do not constitute fraud. However, where one is employed to give advice on matters within the scope of his professional capacity, he commits fraud if he expresses an opinion which he knows to be false or which he gives with utter disregard and recklessness as to its falsity.

COMMENT

Gaines v. Preterm-Cleveland, Inc. (1987), 33 Ohio St.3d 54, 514 N.E.2d 709; 37 American Jurisprudence 2d (1968), Fraud and Deceit, Section 52.

CV 449.09 Duty to investigate, inspect

1. FAILURE TO INVESTIGATE. The defendant claims that the plaintiff had a duty to investigate and was not justified in relying on the representation or failure to disclose. Where a person has the opportunity to (investigate) (inspect) (inquire) and when circumstances would cause a person of ordinary care to (investigate) (inspect) (inquire) and he fails to do so, the element of justifiable reliance has not been proved and plaintiff cannot recover.

2. RELIANCE ON OWN INVESTIGATION. If plaintiff investigates the facts (represented) (concealed) and relies on this investigation and does not rely on facts (represented) (concealed), then plaintiff is not entitled to recover.

3. MISREPRESENTATION CAUSED FAILURE. If representations were made by defendant with an intention to deceive or mislead the plaintiff, causing him to (fail to make) (refrain from making) an (investigation) (inspection) (inquiry) which, in the use of ordinary care, he would have made, there is no duty to investigate, and the plaintiff may justifiably rely on defendant's representations.

CV 449.11 Duty to speak—partial disclosure

1. If a person has a duty to speak, he must make a full and fair disclosure of the material facts. A partial disclosure is a concealment and may be fraud.

CV 449.13 *Caveat emptor* in real estate sales

COMMENT

The following instructions are intended for structural defects in a house or building. If the defect is in the title or the land, the instructions must be changed.

These instructions are drawn from *Layman v. Binns* (1988), 35 Ohio St.3d 176, 519 N.E.2d 642. Note that the doctrine of *caveat emptor* does not apply when specific representations about a material fact are made by the seller, or when the defects are not open and could not have been discovered on reasonable inspection. *Brewer v. Brothers* (1992), 82 Ohio App.3d 148, 153, 611 N.E.2d 492, 495.

The doctrine of *caveat emptor* will defeat a claim of fraudulent or negligent

concealment if the residence is sold "as is," with the buyer having a 14-day inspection period, and if the observable and discoverable conditions would put a reasonable person on notice of a possible defect. *Tipton v. Nuzum* (1992), 84 Ohio App.3d 33, 616 N.E.2d 265.

R.C. 5302.30 requires a transferor of residential real estate with one to four dwelling units to disclose in writing material defects actually known to the transferor without regard to observability or discoverability. Sections (J) and (L) state that the statute shall not bar the transferor's defenses or affect the transferee's common law remedies. The Committee expresses no opinion whether the doctrine of *caveat emptor* survives in these limited real estate sales, or if it survives, whether it is changed in any way.

1. GENERAL. The (buyer) (plaintiff) claims that the (seller) (defendant) fraudulently concealed a structural defect in the (house) (building). The (seller) (defendant) responds that the conduct was not fraudulent, that the defect could have been seen or discovered, and that the (seller) (defendant) did nothing to interfere with the (buyer's) (plaintiff's) opportunity to inspect the (house) (building).

2. DEFENSE OF *CAVEAT EMPTOR*. To recover, the (buyer) (plaintiff) must prove the elements of fraudulent concealment by the greater weight of the evidence. One element is that the (seller) (defendant) knowingly concealed the structural defect when there was a duty to disclose it. A (seller) (defendant) knows a thing is concealed when he is aware that it is hidden. A (seller) (defendant) has no duty to disclose a structural defect to the (buyer) (plaintiff), when

(A) the defect (was discoverable) (could have been discovered) upon reasonable inspection, and

(B) the (buyer) (plaintiff) had a chance to inspect the (house) (building) that was not interfered with by the (seller) (defendant), and

(C) the defect was not hidden or concealed by the (seller) (defendant), and

(D) the defect was not misrepresented or misstated by the (seller) (defendant).

3. FOR THE DEFENDANT. If you find that the (buyer) (plaintiff) failed to prove by the greater weight of the evidence that the (seller) (defendant) knowingly concealed the defect when there was a duty to disclose, you will find in favor of the (seller) (defendant).

4. OTHER ELEMENTS OF FRAUDULENT CONCEALMENT OF DEFECT. You will find in favor of the (buyer) (plaintiff) if it has been proved by the greater weight of the evidence that the (seller) (defendant) knowingly concealed the defect when there was a duty to disclose, and further that:

(A) the concealment was material to the transaction, and

(B) the concealment was made with the intent of misleading the (buyer) (plaintiff), and

(C) the (buyer) (plaintiff) was justifiably misled by the concealment, and

(D) the (buyer) (plaintiff) was injured and the injury was (proximately) (directly) caused by the concealment.

On the other hand, you will find in favor of the (seller) (defendant) if you find that the (buyer) (plaintiff) failed to prove any of these elements of fraudulent concealment by the greater weight of the evidence.

CV 449.15 Damages

1. PROPERTY CASES ONLY. If you find for the plaintiff, you will decide from the greater weight of the evidence what amount of money will reasonably compensate him for the actual damage directly caused by the fraud. The measure of damages in this case is the difference between the represented value and the actual value at the time of the transaction.

2. VENDEE MISREPRESENTATIONS. Where the fraud is by the one acquiring (property) (services), the measure of damages is the actual out-of-pocket loss. It is the difference between the value of the (property delivered) (services rendered) and the (amount paid) (consideration received).

COMMENT

For damages for other injuries, see OJI-CV Chapter 315. There may be consequential damages which should be included in § 2. See also, 51 Ohio Jurisprudence 3d (1984), Fraud and Deceit, Section 219.

3. PUNITIVE DAMAGES. OJI-CV 315.37.

4. NOMINAL DAMAGES.

COMMENT

Stenger v. Meyers (App. 1935), 19 Ohio Law Abs. 304; OJI-CV 431.05 § 11(C).

CV 449.17 Conclusion

If you find that the plaintiff has proved by the greater weight of the evidence all of the elements of fraud, your verdict must be for the plaintiff and you will then consider damages.

However, if you find that the plaintiff has failed to prove by the greater weight of the evidence any one or more of the elements of fraud or if you are unable to determine what happened, your verdict must be for the defendant.

Chapter CV 450

ADULTERATED FOOD, COSMETICS AND DRUGS

CV 450.01 Adulterated food *[Rev. 5-7-11]*

CV 450.01 Adulterated food *[Rev. 5-7-11]*

COMMENT

Ohio's Pure Food and Drug Law, R.C. Chapter 3715, is silent on whether it provides a private, statutory cause of action. The Committee takes no position on whether Chapter 3715 creates a substantive, private claim for relief. Ohio courts have held that a violation of Chapter 3715 creates an action for negligence per se. *Allen v. Grafton* (1960), 170 Ohio St. 249 ("A violation of our statutes, making it a crime to sell 'food *** that is adulterated,' constitutes negligence per se.") Since then, numerous courts have held that a violation of Chapter 3715 constitutes negligence per se. *Donley v. Pinnacle Foods Group, LLC* (Dec. 28, 2009), S.D.Ohio No. 2:09-cv-540; *Summers v. Max & Erma's Restaurant, Inc.*, 11th Dist. No. 2008-T-0001, 2008-Ohio-4156; *Thomas v. Speedway Superamerica, LLC*, 9th Dist. No. 06CA0004, 2006-Ohio-5068; *Woeste v. Washington Platform Saloon & Restaurant*, 163 Ohio App.3d 70, 2005-Ohio-4694.

Since the effective date of S.B. 80 in 2005, the language of Ohio's Product Liability Act (OPLA), R.C. 2307.71 et seq., was changed to preempt any claim for relief based on common law negligence for a defective product. Because Ohio has passed a separate statute to protect its citizens from the sale of adulterated food and because negligence per se generally has its basis in statute, this change to the OPLA may have no effect on cases based on a violation of the Pure Food and Drug Law. See, generally, *Donley v. Pinnacle Foods Group, LLC* (Dec. 28, 2009), S.D.Ohio No. 2:09-cv-540. However, there is also an argument that negligence per se merely establishes the duty element of common law negligence, thus a claim based upon a violation of R.C. Chapter 3715 has been abrogated by R.C. 2307.71(B).

This instruction may be modified by the judge to deal with allegedly adulterated drugs or cosmetics. See R.C. 3715.63 (drugs) and R.C. 3715.66 (cosmetics).

Other claims for relief may apply to allegations of adulterated foods, especially claims brought under the OPLA and the UCC. See OJI-CV Chapter 451, OJI-CV 505.13, and OJI-CV 505.15.

1. GENERAL. The plaintiff claims that the defendant sold him/her adulterated food that caused injury to him/her. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the defendant's act or failure to act (allowed) (caused) adulterated food to be sold to the plaintiff and the adulterated food was the (proximate) (direct) cause of injury to the plaintiff.

2. ADULTERATED. R.C. 3715.59.

3. DELETERIOUS SUBSTANCE OR SUBSTANCE UNFIT FOR FOOD. ("Deleterious substance") (Substance "unfit for food") means a substance that a consumer reasonably would not anticipate to be in the food product allowing the consumer to guard himself/herself against the danger presented by it.

COMMENT

R.C. 3715.59 uses the terms "deleterious substance" and substance "unfit for food" in some subsections to determine whether food is "adulterated." If the judge decides that these subsections are applicable, this instruction should be used to define those terms.

"Deleterious" or "unfit for food" are not defined in Revised Code Chapter 3715. Case law has long used the definition in this paragraph to determine whether food is "adulterated." See *Allen v. Grafton* (1960), 170 Ohio St. 249.

4. DAMAGES. OJI-CV 315.01

5. CONCLUSION. OJI-CV Chapter 313.

Chapter CV 451

PRODUCT LIABILITY

CV 451.01 Statutory product liability *[Rev. 5-7-11]*

CV 451.03 Statutory defect in manufacture or construction *[Rev. 5-7-11]*

CV 451.05 Statutory defect in design or formulation *[Rev. 5-7-11]*

CV 451.07 Statutory failure to warn *[Rev. 5-7-11]*

CV 451.09 Statutory non-conformance to representation *[Rev. 12-13-03]*

CV 451.11 Common law negligent design (claims arising before April 7, 2005) *[Rev. 1-21-06]*

CV 451.13 Common law negligent construction or manufacture (for claims arising before April 7, 2005) *[Rev. 1-21-06]*

CV 451.15 Common law negligent failure to warn by a manufacturer or supplier (for claims arising before April 7, 2005) *[Rev. 1-21-06]*

CV 451.17 Common law breach of implied warranty *[Rev. 1-21-06]*

CV 451.19 Affirmative defenses *[Rev. 1-21-06]*

CV 451.21 Damages *[Rev. 2-23-08]*

CV 451.23 Interrogatories (claims arising on and after 4/9/03) *[Rev. 4-1-06]*

CV 451.01 Statutory product liability *[Rev. 5-7-11]*

COMMENT

The Supreme Court held in *Carrel v. Allied Products Corp.*, 78 Ohio St.3d 284, 1997-Ohio-12, and *Cincinnati v. Beretta*, 95 Ohio St.3d 416, 2002-Ohio-2480, that certain claims asserting damages caused by a product have both a statutory form and a common law form. Therefore, for claims arising before 4/7/2005, plaintiffs can proceed under the Ohio Product Liability Act (OPLA) (effective 1/5/1988), R.C. 2307.71 et seq., or the common law, or both. For actions arising on and after 4/7/2005, the General Assembly abrogated in S.B. 80 all common law product liability claims for relief.

The Committee believes that the OPLA is applicable to harmful, tainted, or adulterated food products. The OPLA is applicable to a "product" that is broadly defined in the OPLA as "any object, substance, mixture, or raw material that constitutes tangible personal property." A reasonable reading of this definition would include food products. Moreover, the OPLA specifically excludes certain goods that would otherwise fall within the definition of "product," and foods products are not among the exceptions. In *Mitchell v. Fridays*, 140 Ohio App.3d 459 2000-Ohio-2591, the Seventh District Court of Appeals held that the OPLA

did not apply to food products. However, the court in this case provided no reasoning for its conclusion. In a more recent case, *Woeste v. Washington Platform Saloon & Restaurant*, 163 Ohio App.3d 70, 2005-Ohio-4694, the First District Court of Appeals held that the OPLA was applicable in a case involving allegations of harmful bacteria in raw oysters.

Although the Committee believes that the OPLA applies to allegations of harmful, tainted or adulterated food, it also believes that the warranty provisions of the UCC remain applicable to these allegations. See OJI-CV 505.13, OJI-CV 505.15. The Committee believes that there may also be a possible direct private claim for relief available for violation of Ohio's Adulterated Foods Act, R.C. 3715.52. See OJI-CV Chapter 450; *Donley v. Pinnacle Foods Group, LLC* (Dec. 28, 2009), S.D.Ohio No. 2:09-cv-540.

1. GENERAL. A manufacturer of a defective product is liable for harm that results when the product is used for its intended or reasonably foreseeable purpose.

COMMENT

Drawn from R.C. 2307.73.

2. MANUFACTURER. "Manufacturer" means a person engaged in a business to design, formulate, produce, create, make, construct, assemble, or rebuild a product or a component of a product.

COMMENT

R.C. 2307.71(A)(9).

3. HARM. "Harm" means death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question.

COMMENT

R.C. 2307.71(A)(7).

If harm is established, economic loss may be recovered. See 2307.79(A). The Supreme Court has held that when commercial parties are in privity, economic damages are not recoverable under negligence, common law product liability theories, or statutory product liability. See *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480; *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40. Commercial parties not in privity, however, may recover economic damages if the defective product caused tangible physical injury

to persons or property and that tangible physical injury caused the economic damages. See *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 73 Ohio St.3d 609, 1995-Ohio-285.

4. CLAIMS. The plaintiff claims that the defendant('s)(s') (*describe product*) was defective

(*Use appropriate alternative[s]*)

(A) in manufacture or construction.

COMMENT

R.C. 2307.74. See OJI-CV 451.03.

(*or*)

(B) in design or formulation.

COMMENT

R.C. 2307.75. See OJI-CV 451.05.

(*or*)

(C) due to inadequate warning or instruction.

COMMENT

R.C. 2307.76. See OJI-CV 451.07.

(*or*)

(D) because it did not conform to a representation made by the manufacturer.

COMMENT

Drawn from R.C. 2307.77. See OJI-CV 451.09.

The defendant(s) denies the plaintiff's claims.

5. BURDEN OF PROOF. OJI-CV 303.03.

6. PREPONDERANCE. OJI-CV 303.05; R.C. 2307.73(A).

7. PROXIMATE CAUSE. OJI-CV 405.01; R.C. 2307.73(A)(2).

8. AFFIRMATIVE DEFENSES. OJI-CV 451.19.

9. DAMAGES. OJI-CV 451.21.

10. CONCLUSION. OJI-CV Chapter 313.

CV 451.03 Statutory defect in manufacture or construction R.C. 2307.74 *[Rev. 5-7-11]*

1. GENERAL. A product is defective in manufacture or construction if, at the time it left the control of the manufacturer, it (deviated) (differed) in a (material) (significant) way from

(Use appropriate alternative[s])

(A) the manufacturer's design specification, formula, or performance standards;

(or)

(B) otherwise identical units manufactured to the same design specifications, formula, or performance standards.

COMMENT

If the evidence raises a factual issue about "material," an instruction may be drawn by reference to synonymous language such as "significant" or "of importance."

2. STRICT LIABILITY. A manufacturer is liable for a defect in manufacture that proximately causes harm even though the manufacturer exercised all possible care in the manufacture or construction of that product.

COMMENT

Although the Committee believes that the Ohio Products Liability Act (OPLA) applies to allegations of harmful, tainted, or adulterated food, it also believes that the warranty provisions of the UCC remain applicable to these allegations. See OJI-CV 505.13, OJI-CV 505.15. The Committee believes that there may also be a possible direct private claim for relief available for violation of Ohio's Adulterated Foods Act, R.C. 3715.52. See OJI-CV Chapter 450; *Donley v. Pinnacle Foods Group, LLC* (Dec. 28, 2009), S.D.Ohio No. 2:09-cv-540.

CV 451.05 Statutory defect in design or formulation R.C. 2307.75 *[Rev. 5-7-11]*

COMMENT

The Supreme Court held in *Perkins v. Wilkinson Sword, Inc.*, 83 Ohio St.3d 507, 1998-Ohio-16, that the risk benefit and consumer expectation tests are not mutually exclusive. The trial court may apply either or both. S.B. 80 eliminates the consumer expectation test as a basis for a claim arising on and after 4/7/2005; however, S.B. 80 retains the consumer expectation test as a risk factor associated with the product's design or formulation.

Although the Committee believes that the Ohio Product Liability Act (OPLA) applies to allegations of harmful, tainted, or adulterated food, it also believes that the warranty provisions of the UCC remain applicable to these allegations. See OJI-CV 505.13, OJI-CV 505.15. The Committee believes that there may also be a possible direct private claim for relief available for violation of Ohio's Adulterated Foods Act, R.C. 3715.52. See OJI-CV Chapter 450 and *Donley v. Pinnacle Foods Group*, LLC (Dec. 28, 2009), S.D.Ohio No. 2:09-cv-540.

For negligence and common law product liability claims involving adulterated foods, despite some lack of clarity in the case law, Ohio courts have generally applied the "consumer expectations" test, rather than the "foreign/natural" test. See *Allen v. Grafton* (1960), 170 Ohio St. 249; *Thompson v. Lawson Milk* (1976), 48 Ohio App.2d 143; *Lewis v. Handel's Homemade Ice Cream*, 11th Dist. No. 2002-T-0126, 2003-Ohio-3507. For cases arising under the OPLA after 4/6/2005, the "reasonable expectations" test is only one factor in determining whether a product is defectively designed. Earlier cases should inform the judge as to the application of the reasonable expectation test in the context of adulterated foods.

1. GENERAL. A product is defective in design or formulation when

(Use appropriate alternative[s])

(A) RISK BENEFIT TEST. At the time the product left the manufacturer's control, the product's foreseeable risks associated with its design or formulation exceeded the benefits associated with the product's design or formulation;

COMMENT

Drawn from R.C. 2307.75(A).

(or)

(B) CONSUMER EXPECTATION TEST. (Applicable only to claims arising before 4/7/05). The product was more dangerous than an ordinary consumer would

expect when used in an intended or reasonably foreseeable manner.

COMMENT

Drawn from former R.C. 2307.75(A)(2).

2. EXPLANATION OF RISK BENEFIT TEST.

(A) FORESEEABLE RISK. "Foreseeable risk" means a risk of harm that is

(1) associated with an intended or reasonably foreseeable use, modification, or alteration of the (*describe product*); and

(2) a risk that the manufacturer should recognize while exercising

(a) the attention, perception, memory, knowledge, and intelligence that a reasonable manufacturer should possess; and

(b) any superior attention, perception, memory, knowledge, or intelligence actually possessed by the manufacturer.

COMMENT

Drawn from R.C. 2307.71(A)(6).

(B) FORSEEABLE RISK FACTORS. In determining the foreseeable risk(s) associated with the product's design or formulation, you should consider the following, together with all the facts and circumstances in evidence:

(1) the nature and magnitude of the risks of harm associated with the product's design or formulation in light of its intended and reasonably foreseeable uses, modifications, or alterations;

(2) the product users' likely awareness of the risks of harm, whether based on warnings, general knowledge, or otherwise;

(3) the likelihood that the product's design or formulation would cause harm in light of its intended and reasonably foreseeable uses, modifications, or alterations; (and)

(4) the extent to which the product's design or formulation conformed to any applicable public or private standard that was in effect when it left the manufacturer's control; (and)

(5) (Applicable only to claims arising after 4/6/2005) the extent to which the product's design or formulation is more dangerous than a reasonably prudent consumer would expect when used in an intended or reasonably

foreseeable manner. Foreseeable uses of a product include those that might reasonably be expected, but not all uses which could occur.

COMMENT

Drawn from R.C. 2307.75(B)(1) – (5).

(C) BENEFITS FACTORS. In determining the benefits associated with the product's design or formulation, you should consider the following:

(1) the product's intended or actual utility, including any performance or safety advantages associated with its design or formulation;

(2) the technical and economic feasibility of using an alternative design or formulation determined at the time the product left the manufacturer's control; and

(3) the nature and magnitude of any foreseeable risks associated with an alternative design or formulation.

COMMENT

Drawn from R.C. 2307.75(C)(1–3).

3. EXPLANATION OF CONSUMER EXPECTATION TEST (Applicable only to claims arising before 4/7/05). A product is defective if it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Foreseeable uses of a product include those that might reasonably be expected, but not all uses that could occur. You must decide whether the plaintiff's injury occurred as a direct result of using the (*describe product*) in a manner that was intended or reasonably foreseeable. If the (*describe product*) was so used and was more dangerous than an ordinary consumer would expect, then the plaintiff has proved the existence of a defect. If it was not so used, then the plaintiff has failed to prove the existence of a defect.

COMMENT

Drawn from former R.C. 2307.75(A)(2) and (B)(1). See, also, *Knitz v. Minster Machine Co.* (1982), 69 Ohio St.2d 460.

4. STATUTORY EXEMPTIONS.

COMMENT

R.C. 2307.75(D), (E), and (F).

The statute does not specify whether the plaintiff or the defendant carries the burden of proof or even the burden of producing evidence in subsections (D), (E), and (F) of R.C. 2307.75. Courts have placed the burden of proof on the plaintiff. *Jacobs v. E. I. DuPont de Nemours & Co.* (C.A.6, 1995), 67 F.3d 1219; *McGrath v. General Motors Corp.* (C.A.6, 2002), 26 F.App. 506; *Bloomer v. Van-Kow Enterprises* (May 5, 1994), 8th Dist. No. 64970.

(*Use appropriate alternative[s]*)

(A) An ethical drug or ethical medical device is not defective in design or formulation because some aspect of it is unavoidably unsafe if the manufacturer of the ethical drug or ethical medical device provides adequate warning and instruction concerning that unavoidably unsafe aspect.

COMMENT

See R.C. 2307.76(C) for warning requirements.

See R.C. 2307.71 for definitions of ethical drugs or ethical medical device.

See *White v. Wyeth Laboratories, Inc.* (1988), 40 Ohio St.3d 390 (whether an ethical drug is defective under comment k is a determination to be made on a case-by-case basis). See, also, *Wagner v. Roche Laboratories*, 77 Ohio St.3d. 116, 1996-Ohio-85.

(*or*)

(B) A product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by a characteristic of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and that is recognized by the ordinary person with the ordinary knowledge common to the community.

COMMENT

See R.C. 2307.75(E) and Restatement of the Law 2d, Torts (1965), section 402A, comment i.

(*or*)

(C) (Claims arising before 4/7/05). A product is not defective in design or formulation if, at the time the product left the control of the manufacturer, a practical and technically feasible alternative design or formulation was not available that would have prevented the harm for which the claimant seeks to recover damages without substantially impairing the usefulness or intended purpose of the product unless the manufacturer acted unreasonably in introducing the product into trade or commerce.

(*or*)

(C) (Claims arising on and after 4/7/05). A product is not defective in design or formulation if, at the time the product left the control of the manufacturer, a practical and technically feasible alternative design or formulation was not available that would have prevented the harm for which the claimant seeks to recover damages without substantially impairing the usefulness or intended purpose of the product.

COMMENT

Drawn from R.C. 2307.75(F).

CV 451.07 Statutory failure to warn R.C. 2307.76 *[Rev. 5-7-11]*

COMMENT

Although the Committee believes that the Ohio Product Liability Act (OPLA) applies to allegations of harmful, tainted, or adulterated food, it also believes that the warranty provisions of the UCC remain applicable to these allegations. See OJI-CV 505.13, OJI-CV 505.15. The Committee believes that there may also be a possible direct private claim for relief available for violation of Ohio's Adulterated Foods Act, R.C. 3715.52. See OJI-CV Chapter 450; *Donley v. Pinnacle Foods Group, LLC* (Dec. 28, 2009), S.D.Ohio No. 2:09-cv-540. For a case applying the OPLA for failure to warn in the case of adulterated food, see *Woeste v. Washington Platform Saloon & Restaurant*, 163 Ohio App.3d 70, 2005-Ohio-4694.

1. GENERAL. A product is defective due to an inadequate warning or instruction if

(*Use appropriate alternative[s]*)

(A) when the product left the control of its manufacturer, both

(1) the manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused the plaintiff's harm; and

(2) the manufacturer failed to provide the warning or instruction that a

manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type claimed by the plaintiff and in light of the likely seriousness of that harm;

(*or*)

(B) the product was defective due to inadequate post-marketing warning or instruction if, at a relevant time after it left the control of its manufacturer, both

(1) the manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused the plaintiff's harm; and

(2) the manufacturer failed to provide the post-marketing warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type claimed by the plaintiff and in light of the likely seriousness of that harm.

2. MANUFACTURER'S STANDARD OF CARE/KNOWLEDGE. One who manufactures a product for sale is held to the skill of an expert in that business and to an expert's knowledge of the arts, materials, and processes involved in the development, production, and marketing of the product. The manufacturer has the duty to remain reasonably current with scientific knowledge, development, research, and discoveries concerning the product. The manufacturer must communicate its superior knowledge to those who, because of their own limited knowledge and information, would otherwise be unable to protect themselves.

However, a manufacturer need not instruct or warn (regarding the use of its product) unless and until the state of medical, scientific, and technical research and knowledge has reached a level of development that would make a reasonably prudent manufacturer aware of the unreasonable risks of harm created by the product and aware of the necessity to instruct or warn (ordinary users of the product) against such risks of harm.

3. STATUTORY EXEMPTIONS.

COMMENT

R.C. 2307.76(B) and (C).

The statute does not specify whether the plaintiff or defendant carries the burden of proof or even the burden of producing evidence in subsections (B) and (C) of R.C. 2307.76. Courts have placed the burden on the plaintiff. *Schremp v. Haugh's Prods.* (Nov. 19, 1997), 6th Dist. No. 97CA006655; *Hughes v. Plastivax, Inc.* (June 27, 1997), 11th Dist. No. 96-L-174.

(A) COMMON KNOWLEDGE. A product is not defective due to lack of warning or instruction or inadequate warning or instruction as a result of the failure of its manufacturer to warn or instruct about an open and obvious risk or a risk that is a matter of common knowledge.

(B) LEGALLY AUTHORIZED PERSONNEL. An ethical drug is not defective due to inadequate warning or instruction if its manufacturer provides otherwise adequate warning and instruction to the physician or other legally authorized person who prescribes or dispenses that ethical drug for a claimant in question and if the Federal Food and Drug Administration has not provided that warning or instruction relative to that ethical drug is to be given directly to the ultimate user of it.

COMMENT

See R.C. 2307.71 for definitions of ethical drugs or ethical medical device. See, also, *Seley v. G.D. Searle & Co.* (1981), 67 Ohio St.2d 192; *White v. Wyeth Laboratories, Inc.* (1989), 40 Ohio St.3d 390; *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 1996-Ohio-85.

CV 451.09 Statutory non-conformance to representation R.C. 2307.77 *[Rev. 12-13-03]*

1. GENERAL. A product is defective if it did not conform, when it left the control of the manufacturer, to a representation made by the manufacturer and justifiably relied on by the plaintiff. A product is defective if it did not conform to such a representation even though the manufacturer did not act fraudulently, recklessly, or negligently in making the representation.

2. REPRESENTATION. "Representation" means an express representation of a material fact concerning the character, quality, or safety of a product.

COMMENT

R.C. 2307.71(N).

The Committee believes that the claimant has to rely on the representation(s) to recover. *Gawloski v. Miller Brewing Co.* (1994), 96 Ohio App.3d 160, 165, appeal dismissed, 71 Ohio St.3d 1411; *Tompkin v. American Brands, Inc.* (N.D. Ohio 1998), 10 F. Supp. 2d 895; *White v. DePuy, Inc.* (1998), 129 Ohio App.3d 472; *Barrett v. Waco International, Inc.* (1997), 123 Ohio App.3d 1; and *Paugh v. R.J. Reynolds Tobacco Company* (N.D. Ohio 1993), 834 F. Supp. 228.

CV 451.11 Common law negligent design (claims arising before April 7, 2005) *[Rev. 1-21-06]*

COMMENT

In Ohio, product liability claims arising before April 7, 2005, have both a statutory and a common law form, following *Carrel v. Allied Products Corp.*, 78

Ohio St.3d 284, 1997-Ohio-12, and *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480. In *Beretta*, supra, the Supreme Court restated the holding of *Carrel*, supra, and adopted the standard for proof of a common law action of negligent design as pronounced in the combination of holdings in *Knitz v. Minster Machine Co.* (1982), 69 Ohio St.2d 460 and *Perkins v. Wilkinson Sword, Inc.*, 83 Ohio St.3d 507, 1998-Ohio-16.

In S.B. 80 effective April 7, 2005, the General Assembly abrogated all common law product liability causes of action.

The Committee believes that for claims arising prior to April 9, 2003, the effective date of S.B. 120, the former comparative negligence statute, R.C. 2315.19, applies to products liability claims based on negligence. S.B. 120 repealed R.C. 2315.19. The Committee therefore believes that the changes imposed by S.B. 120 apply to claims arising on or after April 9, 2003.

1. GENERAL. The plaintiff claims that the defendant negligently designed the (*describe product*) and that such negligence was a proximate cause of damages to the plaintiff.

(Text continued on page 427)

2. NEGLIGENT DESIGN. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) The defendant was the designer of the (*describe product*); and

(B) The (*describe product*) was defectively designed as manufactured. A (*describe product*) is defectively designed as manufactured if

(Use appropriate alternative[s])

(1) the (*describe product*) was more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner,

(or)

(2) the benefits of the challenged design do not outweigh the risk inherent in such design,

(or)

(3) the defendant failed to incorporate feasible safety features to prevent foreseeable injuries;

and

(C) At the time of the injuries to the plaintiff, there had not been substantial change to the (*describe product*) as originally designed and manufactured; or if there had been such a substantial change, the defendant had knowledge and control over such change; and

COMMENT

With regard to post-manufacturing alterations of a product design over which a manufacturer has no knowledge or control, the test of exposure to common law liability for a manufacturer's alleged defective design is provided in *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 323. The holding in *Temple*, supra, exonerates such a manufacturer in the event of "substantial change" from the original design.

(D) The defendant negligently designed the defective (*describe product*).

3. NEGLIGENCE. OJI-CV 401.01.

COMMENT

Although it was not explicitly mentioned by the Court in Beretta, supra, the Committee believes that negligence is necessarily an element of common law negligent design.

4. BURDEN OF PROOF. OJI-CV 303.03.

5. PREPONDERANCE. OJI-CV 303.05.

6. PROXIMATE CAUSE. OJI-CV 405.01.

7. AFFIRMATIVE DEFENSES.

COMMENT

For claims arising before April 9, 2003, see OJI-CV 403.01 Comparative Negligence.

For claims arising on and after April 9, 2003, see OJI-CV 451.19 Affirmative Defenses.

8. DAMAGES. OJI-CV Chapter 315.

CV 451.13 Common law negligent construction or manufacture (for claims arising before April 7, 2005) *[Rev. 1-21-06]*

COMMENT

In Ohio, product liability claims arising before April 7, 2005, the effective date of S.B. 80, have both a statutory form and a common law form, following *Carrel v. Allied Products Corp.*, 78 Ohio St.3d 284, 1997-Ohio-12, and *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480. In S.B. 80, the General Assembly abrogated all common law product liability causes of action.

The Committee believes that for claims arising prior to April 9, 2003, the effective date of S.B. 120, the former comparative negligence statute, R.C. 2315.19 applies to products liability claims based on negligence. S.B. 120 repealed R.C. 2315.19. The Committee therefore believes that the changes imposed by S.B. 120 apply to claims arising on and after April 9, 2003.

1. GENERAL. The plaintiff claims that the defendant negligently constructed or manufactured the (*describe product*) and that such negligence was a proximate cause of damages to the plaintiff.

2. NEGLIGENT CONTSTRUCTION OR MANUFACTURE. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant manufactured or constructed the (*describe product*); and

(B) the defendant failed to exercise ordinary care in the manufacture or construction of the (*describe product*); and

(C) as a direct and proximate result of the defendant's failure to exercise ordinary

care in the manufacture or construction of the (*describe product*), the (*describe product*) was defective when it left the custody and control of the defendant.

COMMENT

In *Gast v. Sears Roebuck & Co.* (1974), 39 Ohio St.2d 29, the Supreme Court approved a common law claim for defect in a product due to negligent manufacture or construction. In *Gast*, supra at syllabus 2, the Court also adopted the doctrine of res ipsa loquitor as an approved modality for proof of a claim for negligent construction or manufacture of a product.

3. NEGLIGENCE. OJI-CV 401.01.
4. BURDEN OF PROOF. OJI-CV 303.03.
5. PREPONDERANCE. OJI-CV 303.05
6. PROXIMATE CAUSE. OJI-CV 405.01.
7. AFFIRMATIVE DEFENSES.

COMMENT

For claims before April 9, 2003, see OJI-CV 403.01 Comparative Negligence.

For claims arising on and after April 9, 2003, see OJI-CV 451.19 Affirmative Defenses.

8. DAMAGES. OJI-CV Chapter 315.

CV 451.15 Common law negligent failure to warn by a manufacturer or supplier (for claims arising before April 7, 2005) *[Rev. 1-21-06]*

COMMENT

In Ohio, product liability claims arising before April 7, 2005, the effective date of S.B. 80, have both a statutory form and a common law form, following *Carrel v. Allied Products Corp.*, 78 Ohio St.3d 284, 1997-Ohio-12, and *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480. In S.B. 80, the General Assembly abrogated all common law product liability causes of action.

The Committee believes that for claims arising prior to April 9, 2003, the effective date of S.B. 120, the former comparative negligence statute, R.C. 2315.19 applies to products liability claims based on negligence. S.B. 120 repealed R.C. 2315.19. The Committee therefore believes that the changes imposed by S.B. 120 apply to claims arising on and after April 9, 2003.

1. GENERAL. The plaintiff claims that the defendant negligently failed to warn users of the risks or hazards associated with the (*describe product*) and that such negligence was a proximate cause of damages to the plaintiff.

2. NEGLIGENT FAILURE TO WARN. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant was the (manufacturer) (supplier) of the (*describe product*); and

(B) the defendant knew or should have known of the risk or hazard of the (*describe product*); and

(C) the defendant negligently failed to warn users by failing to provide information which the defendant possessed and which the defendant should have known was necessary to make use of the (*describe product*) safe for users and those in whose vicinity the (*describe product*) was to be used; and

(D) Such a warning by the defendant would have allowed the user to use the (*describe product*) safely.

COMMENT

In *Crislip v. TCH Liquidating Co.* (1990), 52 Ohio St.3d 251, the Ohio Supreme Court ruled that a common law claim for product liability exists for a negligence claim predicated on inadequate warning.

In *Crislip*, supra at 256, the Court favorably cited comment g to Section 388 of the Restatement of Torts 2d with respect to the manufacturer and supplier's duty to issue adequate warnings associated with a product. Further, in *Crislip*, supra at 258, the Court recognized the affirmative defense of statutory comparative negligence to the common law claim for negligent failure to warn.

3. NEGLIGENCE. OJI-CV 401.01.

4. BURDEN OF PROOF. OJI-CV 303.03.

5. PREPONDERANCE. OJI-CV 303.05.

6. PROXIMATE CAUSE. OJI-CV 405.01.

7. AFFIRMATIVE DEFENSES.

COMMENT

For claims before April 9, 2003, see OJI-CV 403.01 Comparative Negligence.

For claims arising on and after April 9, 2003, see OJI-CV 451.19 Affirmative Defenses.

8. DAMAGES. OJI-CV Chapter 315.

CV 451.17 Common law breach of implied warranty *[Rev. 1-21-06]*

COMMENT

In *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St.2d 227, the Ohio Supreme Court adopted the common law tort claim in product liability cases for breach of implied warranty. In *LaPuma v. Collinwood Concrete*, 75 Ohio St.3d 64, 1996-Ohio-305, the Court ruled that the Ohio Product Liability Act, R.C. Sections 2307.71, et seq., did not preempt the common law claim for breach of implied warranty in cases where there is no privity between the plaintiff and the defendant with regard to the defendant's product and where the plaintiff claims solely economic damages due to failure of the defendant's product.

Some Court of Appeals cases subsequent to *LaPuma* have held that the holding in *LaPuma* does not apply to commercial, as opposed to consumer, plaintiffs. See *Norcold, Inc. v. Gateway Supply Company and Dayco Products, Inc.*, 154 Ohio App.3d 594, 2003-Ohio-4252 and *Midwest Ford, Inc. v. C.T. Taylor Company, Inc.* (1997), 118 Ohio App.3d 798 both holding that a common law action for breach of implied warranty in tort is not available to non-consumer plaintiffs. *Contra Ohio Dept. of Adm. Serv. v. Robert P. Madison Internat'l, Inc.* (2000), 138 Ohio App.3d 388.

The Committee believes that a consumer buyer in privity has no common law claim for breach of implied warranty in tort. The Committee believes that such claims are preempted by the Uniform Commercial Code, the Ohio Products Liability Act, and the Consumers Sales Practices Act.

In S.B. 80, the General Assembly abrogated "all common law product liability causes of action." It is not clear whether this language in S.B. 80 intended to abrogate the cause of action for breach of implied warranty in tort. Since the common law cause of action for breach of implied warranty sounds in tort, and is premised on a product defect, it can be argued that the General Assembly has abrogated it, as well as other common law product liability claims, in S.B. 80. On the other hand, the common law action for breach of implied warranty applies to cases in which a plaintiff suffers only economic harm, i.e., no personal injury or property damage. Under the Product Liability Act a "product liability claim" explicitly does not include cases where the losses are solely economic. There is no indication that the General Assembly intended a different definition of "product liability claim" in its abrogation of "common law product liability" causes of action. Moreover, in substance, the implied warranty in tort cause of action where there is no property damage or personal injury is closer to contract than tort. Therefore, whether S.B. 80 abrogates the common law action for breach of implied warranty in tort is an open question.

1. GENERAL. The plaintiff claims that the defendant breached an implied warranty to the plaintiff and that such breach was a proximate cause of damages to the plaintiff.

2. COMMON LAW IMPLIED WARRANTY. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant was the manufacturer of the (*describe product*); and

(B) at the time the (*describe product*) left the defendant's control, the defendant breached its duty to provide a product of good and merchantable quality and fitness for its intended use.

3. BURDEN OF PROOF. OJI-CV 303.03.

4. PREPONDERANCE. OJI-CV 303.05.

5. PROXIMATE CAUSE. OJI-CV 405.01.

6. AFFIRMATIVE DEFENSES. OJI-CV 451.19.

7. DAMAGES. OJI-CV Chapter 315.

CV 451.19 Affirmative defenses *[Rev. 1-21-06]*

COMMENT

The Committee believes that for claims arising prior to April 9, 2003 the former comparative negligence statute, R.C. 2315.19, applies to products liability claims based on negligence. S.B. 120, effective April 9, 2003, repealed R.C. 2315.19. The Committee therefore believes that the changes imposed by S.B. 120 apply to claims arising on and after April 9, 2003.

1. GENERAL. OJI-CV 303.03 § 4.

2. ASSUMPTION OF THE RISK. OJI-CV 403.09.

COMMENT

Relative to causes of action arising before April 9, 2003, or after April 6, 2005: In claims against a manufacturer (R.C. 2307.73) or a supplier making his own representation (R.C. 2307.78[A][2]) or a supplier liable as if a manufacturer (R.C. 2307.78[B]), express and implied assumption of the risk, whether reasonable or unreasonable, are complete bars to recovery under the statutory scheme. Also under the statutory scheme, in claims against a supplier for his own negligence (R.C. 2307.78[A][1]), the standard rules of comparative negligence apply: express assumption of the risk, whether reasonable or unreasonable, is a complete bar, and implied assumption of the risk, whether reasonable or unreasonable, is merged into contributory negligence and is subject to allocation of fault (percentages of negligence).

Relative to causes of action arising on or after April 9, 2003, and before April 7, 2005: R.C. Section 2315.42. S.B. 120, to the extent applicable, provides that express assumption of risk and implied assump-tion of risk are a complete bar

to recovery against both manufacturers and suppliers.

3. CONTRIBUTORY NEGLIGENCE. OJI-CV 403.01.

COMMENT

Only that portion of OJI-CV 430.01 addressing comparative negligence should be given. The portion addressing assumption of risk is not applicable.

The two defenses differ in significance. Contributory negligence reduces the award, and is a complete defense if it exceeds 50%; assumption of the risk is a complete defense.

4. UNFORESEEABLE USE OF PRODUCT **(Common law claims only arising before April 7, 2005).** The defendant claims that the plaintiff used the (*describe product*) in a way that (was not foreseeable) (the defendant could not have foreseen) and that this use was a proximate cause of the plaintiff's (injury) (damage). The test for foreseeability is whether under all the circumstances, a reasonably (cautious) (careful) (prudent) manufacturer would have anticipated that a consumer of the product was likely to use the product in the same way that you find the plaintiff used the (*describe product*). If you find by the greater weight of the evidence that the plaintiff used it in a way that (was not foreseeable) (the defendant could not have foreseen) and that this use was a proximate cause of the plaintiff's (injury) (damage), then you will find in favor of the defendant on the product liability claim.

COMMENT

Drawn from *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 476. See also *Bowling v. Heil Co.* (1987), 31 Ohio St.3d 277, 282.

The Committee believes that the foregoing instruction is applicable only to common law products liability claims.

5. CONDUCT OF NON-PARTIES **(For claims arising on and after April 9, 2003).** (*insert name of defendant*) claims that the (negligence) (other tortious conduct) of (*identify non-parties*) proximately caused the damages sustained by the plaintiff.

COMMENT

Drawn from R.C. 2307.23(C). Under S.B. 120, the tortious conduct of persons not before the court (which conduct proximately causes the accident) may be asserted as a defense to a product liability claim "if the name of that person has been disclosed prior to trial." R.C. 2307.011(H).

The trial judge must include instructions on the elements of the alleged tortious conduct of other defendants or unnamed parties.

CV 451.21 Damages *[Rev. 2-23-08]*

1. COMPENSATORY DAMAGES (CLAIMS ARISING BEFORE 4/9/03). OJI-CV 315.01.

COMMENT

If a claimant is entitled to recover compensatory damages for harm, the claimant may recover for any economic loss caused by the defective aspect of the product in question. R.C. 2307.79(A).

For claims arising before 4/9/03, the judge should be aware that the definition in OJI-CV 315.01 of "compensatory damages" is to be distinguished from "economic loss" as defined in R.C. 2307.71(B). Pursuant to R.C. 2307.71(B), "economic loss" means direct, incidental, or consequential pecuniary loss, including but not limited to damage to the product in question, and nonphysical damage to property other than that product. Harm is not "economic loss."

The definition under R.C. 2307.71(B) is also to be distinguished from the definitions of "economic loss" and "noneconomic loss" as defined in R.C. 2307.011 (effective 4/9/03).

2. ECONOMIC LOSS (CLAIMS ARISING ON AND AFTER 4/9/03). R.C. 2307.011.

3. NONECONOMIC LOSS (CLAIMS ARISING ON AND AFTER 4/9/03). R.C. 2307.011.

4. PUNITIVE DAMAGES (CLAIMS ARISING ON AND AFTER 4/9/03). R.C. 2307.80(A).

(A) GENERAL. You will also decide whether the defendant is liable for punitive damages in addition to compensatory damages that you award to the plaintiff. The purposes of punitive damages are to punish the offending party and to make the offending party an example to discourage others from similar conduct. You may decide that the defendant is liable for punitive damages if you find by clear and convincing evidence that the harm for which you awarded compensatory damages was the result of misconduct by the defendant that manifested a flagrant disregard for the safety of persons who might be harmed by the product in question. The fact by itself that a product is defective does not establish a flagrant disregard for the safety of persons who might be harmed by that product.

COMMENT

Drawn from 2307.80(A).

The Committee believes that the more specific standard for punitive damages contained in R.C. 2307.80(A) as enacted by S.B. 120, effective 4/9/03, governs product liability claims rather than the more general standard for "tort actions" contained in R.C. 2315.21 as enacted by S.B. 80, effective 4/7/05.

(B) DAMAGES TO NON-PARTIES (ADDITIONAL). Evidence was introduced that (*insert name of defendant*)'s conduct has resulted in harm to persons other than (*insert name of plaintiff*). This evidence may be considered only for the purpose of helping you decide whether (*insert name of defendant*) showed a flagrant disregard for the safety of other persons who might be harmed by his/her/its conduct. However, you are not to punish (*insert name of defendant*) for the direct harm his/her/its alleged misconduct caused to other persons.

COMMENT

Drawn from *Philip Morris v. Williams* (2007), 127 S.Ct. 1057.

(C) DEFENDANT'S OUT-OF-STATE CONDUCT (ADDITIONAL). Evidence was introduced of (*insert name of defendant*)'s conduct in (another state) (other states). You may not use that conduct to punish (*insert name of defendant*) if that conduct was legal where it occurred. This evidence may be considered only for the purpose of helping you decide whether (*insert name of defendant*) showed a flagrant disregard for the safety of other persons who might be harmed by his/her/its conduct.

COMMENT

Drawn from *State Farm v. Campbell* (2003), 538 U.S. 408.

(D) AMOUNT TO BE DETERMINED BY JUDGE. You will decide only whether the plaintiff is entitled to punitive damages; you will not decide the amount of those damages.

COMMENT

The court, not the jury, determines the amount of punitive damages. In determining the amount of punitive damages, the court shall consider seven

non-exclusive factors. R.C. 2307.80(B)(1)-(7). The court should be aware of due process requirements imposed by the U.S. Supreme Court in determining the amount of punitive damages. *State Farm Mutual Insurance v. Campbell* (2003), 538 U.S. 408; *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559.

The Committee believes that the procedure for the judge's determination of the amount of punitive damages contained in R.C. 2307.80(B) as enacted by S.B. 120, effective 4/9/03, governs product liability claims rather than the procedure for the jury's determination of the amount of punitive damages for "tort actions" contained in R.C. 2315.21 as enacted by S.B. 80, effective 4/7/2005.

(E) DRUG OR MEDICAL DEVICE: COMPLIANCE WITH FEDERAL FOOD AND DRUG ADMINISTRATION (FDA) REGULATIONS (OPTIONAL).

COMMENT

The Committee believes that although not specified in R.C. 2307.80, the defendant has the burden of proof by the greater weight of the evidence of establishing the exceptions contained in paragraphs 4(C) and (D) of this instruction.

(Choose appropriate alternative[s])

(1) FDA APPROVED OR LICENSED DRUGS OR DEVICES. You shall not find the defendant liable for punitive damages if you find that the defendant proved by the greater weight of the evidence that the (drug) (device) in question was manufactured and labeled in relevant and material aspects in accordance with the terms of an approval or license issued by the Federal Food and Drug Administration under the Federal Food Drug and Cosmetic Act, unless the plaintiff has further proved by the greater weight of the evidence that the manufacturer fraudulently and in violation of applicable regulations of the Food and Drug Administration withheld from the Food and Drug Administration information known to be material and relevant to the harm that the plaintiff allegedly suffered or misrepresented to the Food and Drug Administration information of that type.

(or)

(2) OVER-THE-COUNTER DRUGS AND DEVICES.

(a) You shall not find the defendant liable for punitive damages if you find that the defendant proved by the greater weight of the evidence that the (drug) (device) in question

(i) was an over-the-counter drug marketed pursuant to federal regulations;

(ii) was generally recognized as safe and effective;

(Text continued on page 437)

(iii) was not misbranded pursuant to (*specify potentially applicable federal regulation[s]*);

(iv) satisfied in relevant and material respects each of the conditions contained in (*specify potentially applicable federal regulation[s]*); and

(v) satisfied each of the conditions contained in applicable monograph(s), if any.

(b) However, you shall find the defendant liable for punitive damages if the plaintiff has proved by the greater weight of the evidence that the manufacturer

(i) fraudulently withheld from the Food and Drug Administration information known to be material and relevant to the harm that the plaintiff allegedly suffered or misrepresented to the Food and Drug Administration information of that type, and

(ii) violated applicable regulations of the Food and Drug Administration in withholding the information.

COMMENT

Drawn from R.C. 2307.80(C).

(F) COMPLIANCE WITH APPLICABLE GOVERNMENT REGULATIONS OTHER THAN REGULATIONS RELATED TO DRUGS AND DEVICES (OPTIONAL). You shall not find the defendant liable for punitive damages if you find that with respect to the product in question the defendant proved by the greater weight of the evidence that

(1) the manufacturer or supplier fully complied with all applicable government safety and performance standards, whether designated as such by the government, relative to

(a) the product's manufacture or construction;

(b) the product's design or formulation;

(c) adequate warnings or instructions; and

(d) representations when the product left the control of the manufacturer or supplier; and

(2) the claimant's injury results from an alleged defect of

(a) the product's manufacture or construction;

(b) the product's design or formulation;

(c) adequate warnings or instructions; and

(d) representations for which there is an applicable government safety or performance standard.

(3) However, you shall find the defendant liable for punitive damages if the plaintiff has proved by the greater weight of the evidence that the manufacturer or supplier of the product

(a) fraudulently (withheld from) (misrepresented to) an applicable government agency information known to be material and relevant to the harm that the plaintiff allegedly suffered), and

(b) violated applicable government safety and performance standards, whether designated as such by the government.

COMMENT

Drawn from R.C. 2307.80(D). The Committee believes that this instruction applies only to products that are not drugs or medical devices regulated by the FDA.

5. CLEAR AND CONVINCING. OJI-CV 303.07.

6. PREPONDERANCE. OJI-CV 303.05.

7. DRUG. 21 U.S.C. 321(g)(1).

8. DEVICE. 21 U.S.C. 321(h).

9. PRINCIPAL AND AGENT. OJI-CV Chapter 423.

10. EMPLOYER AND EMPLOYEE. OJI-CV Chapter 537.

11. ATTORNEY FEES. If you decide that the defendant is liable for punitive damages, you must also decide whether the defendant is liable for the attorney fees of counsel employed by the plaintiff in the prosecution of this action. (If you decide that the defendant is liable for those attorney fees, the court will determine the amount.)

COMMENT

See COMMENT at OJI-CV 315.37 (on and after 4-7-05) § 10 Attorney Fees.

12. REASONABLENESS OF ATTORNEY FEES. OJI-CV 315.39.

COMMENT

This instruction should be used only if the judge submits the issue of amount of attorney fees to the jury.

CV 451.23 Interrogatories (claims arising on and after 4/9/03) *[Rev. 4-1-06]*

COMMENT

The interrogatories in this instruction are based primarily on S.B. 120, effective 4/9/03. However, changes brought about by S.B. 80, effective 4/7/05, are included at the appropriate places.

These interrogatories are designed to permit the court to define the elements of the particular type(s) of product liability (breach of implied warranty, failure to warn, etc.) and the percentage determination of causation.

The Committee believes that for claims arising prior to April 9, 2003, the former comparative negligence statute, R.C. 2315.19, applies to products liability claims based on negligence. The common law and such other statutory provisions as were in effect governed other products claims. S.B. 120, effective April 9, 2003, repealed R.C. 2315.19, and changed the procedure for allocating liability among the various parties to the action, effectively creating new defenses and eliminating the common law concept of "joint and several" liability. The Committee therefore believes that the changes imposed by S.B. 120 apply to claims arising on and after April 9, 2003.

S.B. 120 provides that the negligence or other tortious conduct of the plaintiff or other persons who are not parties can reduce the damages available to a plaintiff who otherwise meets the burdens of proof and persuasion. R.C. 2315.43, 2315.44. The means for determining specific liability of individual parties (or non-parties) is set forth at these sections, and is similar — and in many cases identical — to the procedure to be followed under R.C. 2315.22 and 2315.23, which provide for allocation of awards in cases to which common law joint and several liability formerly applied.

The interrogatory responses should conform to the evidence or lack of evidence about the plaintiff's negligence and the tortious conduct of other persons or parties.

R.C. 2315.44 requires the jurors to "return the general verdict accompanied by answers to interrogatories," to determine the respective amounts of noneconomic and economic damages, and to allocate liability among the plaintiff and defendants by percentages. R.C. 2315.45 then requires the court to "diminish the total amount of the compensatory damages that would have been recoverable by an amount that is proportionately equal to the percentage of negligence or other tortious conduct determined pursuant to section 2307.23 of the Revised Code that is attributable to the plaintiff." The Committee believes that the intent is that the court will limit the plaintiff's recovery by particular defendant according to whether the damages are noneconomic or economic, and whether that defendant's allocable percentage of causation exceeds 50%, pursuant to R.C. 2307.22.

Because the statute provides that the final determination of the amount(s) due is to be made by the court, no instructions for allocation of the award are provided.

1. GENERAL. The plaintiff claims that (*describe claim*). The defendant claims that (*describe form and substance of contributory fault and other affirmative defenses*).

2. INTRODUCTION TO INTERROGATORIES. You will be given written questions called interrogatories. You must answer them in writing, starting with the first question. You must follow carefully the directions about how to proceed, because the directions will tell you what questions to answer and whether to sign the general verdict for the plaintiff or for the defendant. A question is answered when at least (six) (three-fourths) of the jurors agree. All who agree must sign. If six jurors cannot agree on an answer, you will be instructed to report to the court.

3. INTERROGATORIES.

COMMENT

The interrogatories are designed for only one plaintiff. If there is more than one plaintiff, a separate set of interrogatories should be used for each plaintiff.

(A) CLAIM(S).

(Use appropriate alternative[s])

(1) WAS THERE A DEFECT IN THE DESIGN OF THE DEFENDANT'S PRODUCT?

(or)

(2) WAS THERE A DEFECT IN THE CONSTRUCTION OR MANUFACTURE OF THE DEFENDANT'S PRODUCT?

(or)

(3) WAS THERE A DEFECT IN THE PRODUCT CAUSED BY A FAILURE TO ADEQUATELY WARN OR INSTRUCT THE PLAINTIFF OF THE DANGERS OF THE PRODUCT?

(or)

(4) DID THE DEFENDANT'S PRODUCT FAIL TO CONFORM TO REPRESENTATIONS MADE BY THE MANUFACTURER?

(or)

(5) **(For claims arising before 4/7/05)** DID THE DEFENDANT NEGLIGENTLY (DESIGN) (CONSTRUCT OR MANUFACTURE) (FAIL TO WARN ABOUT THE RISKS OR HAZARDS ASSOCIATED WITH) THE PRODUCT?

COMMENT

S.B. 80 abrogated all common law product liability claims. R.C. 2307.71(B).

(or)

(6) **(For claims arising before 4/7/05)** DID THE DEFENDANT BREACH AN IMPLIED WARRANTY ABOUT THE PRODUCT?

COMMENT

The Committee believes that S.B. 80's abrogation of all common law product liability claims includes implied warranty in tort as established in *LaPuma v. Collinwood Concrete* (1996), 75 Ohio St.3d 64. R.C. 2307.71(B).

CIRCLE YOUR ANSWER IN INK YES or NO

_____ _____

_____ _____

_____ _____

_____ _____

If the answer of six or more jurors to (A) is "yes," move to Interrogatory (B).

If the answer of six or more jurors to (A) is "no,"

- do not answer the remaining Interrogatories, and
- sign the general verdict for the defendant, and
- report to the Court that you have completed your deliberations.

If six jurors cannot agree on an answer to Interrogatory (A), report this to the Court.

In answering the following Interrogatory (B) about whether the defendant's conduct directly and proximately caused the plaintiff's (injury) (damages), only those jurors who answered "yes" to Interrogatory (A) are qualified to participate in answering Interrogatory (B).

COMMENT

Ohio follows the "same juror" rule. *O'Connell v. Chesapeake and Ohio Railroad* (1991), 58 Ohio St.3d 226.

(B) DID THE DEFENDANT'S (DEFECT) (FAILURE TO CONFORM) (NEGLIGENCE, IF APPLICABLE) (BREACH OF IMPLIED WARRANTY, IF APPLICABLE) PROXIMATELY CAUSE INJURY TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of six or more jurors to (B) is "yes," move to Interrogatory (C).

If the answer of six or more jurors to (B) is "no,"

- do not answer the remaining Interrogatories, and
- sign the general verdict for the defendant, and
- report to the Court that you have completed your deliberations.

If six jurors cannot agree on an answer to Interrogatory (B), report this to the Court.

COMMENT

For claims arising on and after 4/7/05, when the defendant is a supplier and negligence is asserted, pursuant to R.C. 2307.78(A)(1), the plaintiff's implied assumption of the risk, if any, is not a complete defense and should be treated

as contributory negligence. In such cases use interrogatory (D) instead of interrogatory (C) and modify the directions after interrogatory (B).

(C) DID THE PLAINTIFF (EXPRESSLY) (IMPLIEDLY) ASSUME THE RISK OF INJURY, AND, IF SO, WAS THAT (EXPRESS) (IMPLIED) ASSUMPTION OF THE RISK A DIRECT AND PROXIMATE CAUSE OF THE PLAINTIFF'S INJURY?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer of six or more jurors to (C) is "yes,"

- do not answer the remaining Interrogatories, and
- sign the general verdict for the defendant, and
- report to the Court that you have completed your deliberations.

If the answer of six or more jurors to (C) is "no," move to Interrogatory (D).

If six jurors cannot agree on an answer to Interrogatory (C), report this to the Court.

In answering the following Interrogatory (D) about the percentages of negligence or other conduct that directly and proximately caused the plaintiff's (injury) (damages), only those jurors who answered "yes" to **both** interrogatory (A) and Interrogatory (B) are qualified to participate in answering Interrogatory (D).

(D) WAS THE PLAINTIFF NEGLIGENT, AND DID THAT NEGLIGENCE DIRECTLY AND PROXIMATELY CAUSE THE PLAINTIFF'S OWN (INJURY) (DAMAGES)?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

If the answer to interrogatory (D) is "yes," proceed to interrogatory (E)(1).

If the answer to interrogatory (D) is "no," proceed to interrogatory (E)(2).

If six jurors cannot agree on an answer to Interrogatory (D), report this to the Court.

In answering the following Interrogatory (E)(1) about the percentages of negligence or other conduct that directly and proximately caused the plaintiff's (injury) (damages), please observe the following:

- Only those jurors who answered "yes" to interrogatory (A) and to interrogatory (B) and to Interrogatory (D) are qualified to participate in answering Interrogatory (E)(1), and
- If less than six jurors are qualified to answer (E)(1), report this to the Court, and
- If six jurors who are qualified cannot agree on an answer to (E)(1), report this to the Court.

(E)(1) STATE THE PERCENTAGES OF NEGLIGENCE OF THE PLAINTIFF AND (*DESCRIBE TORTIOUS CONDUCT*) OF DEFENDANT(S) AND OTHER PERSON(S) THAT DIRECTLY AND PROXIMATELY CAUSED THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF NEGLIGENCE ATTRIBUTABLE TO THE PLAINTIFF

_____ %

PERCENTAGE OF (*DESCRIBE TORTIOUS CONDUCT*) ATTRIBUTABLE TO THE FOLLOWING PERSONS OR PARTIES:

COMMENT

The judge must identify every potentially liable person.

(*INSERT NAME OF DEFENDANT OR OTHER PERSON*) ..... _____%

(*INSERT NAME OF DEFENDANT OR OTHER PERSON*) ..... _____%

These percentages must equal the total of 100%

_____ _____

_____ _____

_____ _____

_____ _____

If the percentage attributable to the plaintiff is 50% or less,

- move to Interrogatory (F), and all of the jurors shall participate in the deliberations, and
- sign the general verdict for the plaintiff.

If the percentage attributable to the plaintiff is more than 50%,

- do not answer the remaining Interrogatories, and
- sign the general verdict for the defendant(s), and
- report to the court that you have completed your deliberations.

In answering the following Interrogatory (E)(2) about the percentages of negligence or other conduct that directly and proximately caused the

plaintiff's (injury) (damages), please observe the following:

- Only those jurors who answered "yes" to interrogatory (A) and to interrogatory (B) and "no" to Interrogatory (D) are qualified to participate in answering Interrogatory (E)(2), and
- If less than six jurors are qualified to answer (E)(2), report this to the Court, and
- If six jurors who are qualified cannot agree on an answer to (E)(2), report this to the Court.

(E)(2) STATE THE PERCENTAGES OF (NEGLIGENCE) (*DESCRIBE OTHER TORTIOUS CONDUCT*) OF DEFENDANT(S) OR OTHER PERSON(S)) THAT DIRECTLY AND PROXIMATELY CAUSED THE PLAINTIFF'S (INJURY) (DAMAGES):

PERCENTAGE OF (*DESCRIBE TORTIOUS CONDUCT*) ATTRIBUTABLE TO THE FOLLOWING PERSONS OR PARTIES:

COMMENT

The judge must identify every potentially liable person.

(*INSERT NAME OF DEFENDANT OR OTHER PERSON*) . . . . . _____%

These percentages must equal the total of 100%

_____ _____

_____ _____

_____ _____

_____ _____

In answering the following Interrogatory (F) about the compensatory damages of the plaintiff, please observe the following:

- All jurors are qualified to participate in answering Interrogatory (F).

(F) PLEASE STATE THE FOLLOWING:

(1) THE PORTION OF THE COMPENSATORY DAMAGES THAT REPRESENTS ECONOMIC LOSS OF THE PLAINTIFF.

_____%

_____ _____

_____ _____

_____ _____

_____ _____

(2) THE PORTION OF THE COMPENSATORY DAMAGES THAT REPRESENTS NONECONOMIC LOSS OF THE PLAINTIFF.

_____%

_____ _____
_____ _____
_____ _____
_____ _____

(3) THE TOTAL AMOUNT OF THE COMPENSATORY DAMAGES SUSTAINED BY THE PLAINTIFF (TOTAL OF "ECONOMIC" AND "NONECONOMIC" LOSS).

_____%

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

S.B. 120 requires that the jury distinguish between economic and noneconomic damages. The distinction between economic and noneconomic damages is significant, because different percentages of each may be recoverable against particular defendants, depending on the allocation of liability. R.C. 2307.22, 2307.23.

Chapter CV 453

TORTIOUS INTERFERENCE WITH ECONOMIC RELATIONS

CV 453.01 Tortious interference with business relations *[Rev. 2-23-08]*

CV 453.03 Tortious interference with contractual relations *[Rev. 2-23-08]*

CV 453.05 Tortious interference with employment relations *[Rev. 2-23-08]*

CV 453.07 Tortious interference with expectancy of inheritance *[Rev. 12-5-09]*

CV 453.01 Tortious interference with business relations *[Rev. 2-23-08]*

COMMENT

Tortious interference with business relations is but one example of interference with economic relationships, which includes tortious interference with contractual relations and tortious interference with employment relations. OJI-CV 453.03, OJI-CV 453.05. See, also, *A & B-Abell Elevator Co., Inc.*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *Walter v. ADT Sec. Sys., Inc.*, 10th Dist. No. 06AP-115, 2007-Ohio-3324. Tortious interference with business relations and tortious interference with contractual relations differ only in that the former tort does not require proof of a contractual relationship. *A & B-Abell Elevator Co., Inc.*, 73 Ohio St.3d 1, 1995-Ohio-66. Thus, "[t]he main difference between tortious interference with a contract and tortious interference with a business relationship is that interference with a business relationship includes intentional interference with prospective contractual relations, not yet reduced to a contract." *Walter v. ADT Sec. Sys., Inc.*, 10th Dist. No. 06AP-115, 2007-Ohio-3324, at ¶ 31.

1. GENERAL. The plaintiff claims that the defendant (purposely) (intentionally) interfered with the plaintiff's business relations with (*insert name of third party*) by (*describe nature of alleged interference*), and that the plaintiff was damaged as a result. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) there was (an existing) (a prospective) business relationship between the plaintiff and (*insert name of third party*); and

(B) the defendant knew of the business relationship; and

(C) the defendant acted with the (purpose) (intent) to interfere with the plaintiff's business relationship; and

(D) the defendant lacked a (justification) (privilege); and

(E) the plaintiff was injured as a (proximate) (direct) result of the act(s) of the defendant.

COMMENT

Drawn from *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *Brookside Ambulance, Inc. v. Walker Ambulance Serv.* (1996), 112 Ohio App.3d 150. *Cf. Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 1999-Ohio-260 (describing elements of analogous interference with contractual relations claim).

2. BUSINESS RELATIONSHIP. "Business relationship" includes prospective contractual relations and continuing business or other customary relationships not amounting to a contract.

COMMENT

Drawn from *Restatement of the Law 2d, Torts* (1979) § 766B.

3. LACKED JUSTIFICATION/LACKED PRIVILEGE. ("Lacked a justification") ("Lacked a privilege") means that the defendant's interference with the business relationship was improper. In deciding whether the defendant (lacked a justification) (lacked a privilege), you should consider all the following factors:

(A) the nature of the defendant's conduct;

(B) the defendant's motive;

(C) the interests of the plaintiff with which the defendant's conduct interfered;

(D) the interests sought to be advanced by the defendant;

(E) the social interests in protecting the freedom of action of the defendant and the business interests of the plaintiff;

(F) the proximity or remoteness of the defendant's conduct to the interference; and

(G) the relations between the plaintiff and the defendant.

COMMENT

Drawn from *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171,

1999-Ohio-260; *Hoyt, Inc. v. Gordon & Assoc., Inc.* (1995), 104 Ohio App.3d 598.

(Text continued on page 449)

See comments (a) — (g), *Restatement of the Law 2d, Torts* (1979) § 767 for further discussion of these elements.

4. PRIVILEGE (OPTIONAL). A "privilege" is a circumstance or justification that would make the defendant's otherwise improper act(s) excusable.

COMMENT

This instruction is applicable only if the judge previously used the term "privilege."

Drawn from *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *Chandler and Assoc., Inc. v. America's Healthcare Alliance, Inc.* (1997), 125 Ohio App.3d 572; *Castillo v. Associated Pathologists*, 6th Dist. No. L-06-1076, 2006-Ohio-6459.

5. FINDINGS — INTERFERENCE WITH BUSINESS RELATIONSHIP BY DEFAMATION (ADDITIONAL).

COMMENT

This instruction is applicable only if the plaintiff introduces evidence of defamation and actual malice.

The plaintiff claims that even if the defendant had a (justification) (privilege), the defendant defamed plaintiff and did so with actual malice. If you find that the plaintiff has proved all the elements of his/her/its claim by the greater weight of the evidence except for the element of lack of (justification) (privilege), you shall find for the plaintiff if the plaintiff proved by clear and convincing evidence that the defendant defamed plaintiff and did so with actual malice.

COMMENT

Drawn from *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *Chandler and Assoc., Inc. v. America's Healthcare Alliance, Inc.* (1997), 125 Ohio App.3d 572; *Castillo v. Associated Pathologists*, 6th Dist. No. L-06-1076, 2006-Ohio-6459.

6. DEFAMATION (ADDITIONAL). OJI-CV 431.01.

7. ACTUAL MALICE (ADDITIONAL). "Actual malice" occurs when the defendant

makes a false statement either with knowledge that it is false or with reckless disregard of whether it is false or not.

COMMENT

OJI-CV 431.01 § 9.

Where a tortious interference claim is based on allegations of defamatory statements, the same actual malice standard applicable to defamation applies to the interference claim. *Rizvi v. St. Elizabeth Hosp. Med. Ctr.*, 146 Ohio App.3d 103, 2001-Ohio-3412, citing *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *El-Shiekh v. Northwest Ohio Cardiology Consultants* (Sept. 15, 2000), 6th Dist. Nos. L-99-1380 and CI-97-4238. It is possible that "a different level of intent may apply to tortious interference cases not intertwined with defamation claims." *Harris v. University Hosp. of Cleveland*, 8th Dist. Nos. 76724 and 76785, 2002-Ohio-983.

8. CLEAR AND CONVINCING EVIDENCE (ADDITIONAL). OJI-CV 303.07.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

11. DAMAGES — LOST PROFITS (ADDITIONAL). Lost profits are calculated by deciding what the plaintiff was entitled to receive had the plaintiff and (*insert name of third party*) (continued their) (entered into a) business relationship. You should then add other damages, if any, suffered by the plaintiff as a result of the defendant's improper interference. From this sum you should subtract the amount, if any, that the plaintiff saved by not having to fully perform in the business relationship. You may only award damages the existence and amount of which are reasonably certain and have been proved to you by the greater weight of the evidence. You may not award damages that are remote or speculative.

COMMENT

Drawn from *Try Hours, Inc. v. Swartz*, 6th Dist. No. L-06-1077, 2007-Ohio-1328.

Although unjust enrichment is not an available measure of damages in a tortious interference case, a defendant's profits obtained from the plaintiff's customers during the relevant time period(s) can provide one basis for calculating the plaintiff's damages. This measure of damages targets the plaintiff's loss (including lost profits) that arises out of the tortious interference, not the defendant's gain. Thus, "the appropriate measure of damages for lost profits [is] a compensatory damage formula, whereby lost profits are calculated by reducing the amount of revenue plaintiff would have generated, but for the tortfeasor's actions, by the costs the plaintiff would have incurred in generating

such revenue." Id. at ¶ 27.

12. CONCLUSION. OJI-CV Chapter 313.

CV 453.03 Tortious interference with contractual relations *[Rev. 2-23-08]*

COMMENT

Tortious interference with contractual relations is but one example of interference with economic relationships, which includes tortious interference with business relations and tortious interference with employment relations. OJI-CV 453.01, OJI-CV 453.05. See, also, *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *Walter v. ADT Sec. Sys., Inc.*, 10th Dist. No. 06AP-115, 2007-Ohio-3324. Tortious interference with business relations and tortious interference with contractual relations differ only in that the former tort does not require proof of a contractual relationship. *A & B-Abell Elevator Co., Inc*, 73 Ohio St.3d 1, 1995-Ohio-66. Thus, "[t]he main difference between tortious interference with a contract and tortious interference with a business relationship is that interference with a business relationship includes intentional interference with prospective contractual relations, not yet reduced to a contract." *Walter v. ADT Sec. Sys., Inc.*, 10th Dist. No. 06AP-115, 2007-Ohio-3324, at ¶ 31.

1. GENERAL. The plaintiff claims that the defendant (purposely) (intentionally) interfered with the plaintiff's contractual relations with (*insert name of third party*) by (*describe nature of alleged interference*), and that the plaintiff was damaged as a result. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) there was a contract between the plaintiff and (*insert name of third party*); and

(B) the defendant knew of the contract; and

(C) the defendant acted with the (purpose) (intent) to procure the contract's breach; and

(D) the defendant lacked a (justification) (privilege); and

(E) the plaintiff was injured as a (proximate) (direct) result of the act(s) of the defendant.

COMMENT

Drawn from *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 1995-Ohio-61. In *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 1999-Ohio-260, the Supreme Court reaffirmed *Kenty* but also appeared to treat

the "privilege of fair competition" as an affirmative defense in the context of a terminable at will contract.

2. CONTRACT. OJI-CV 501.03.

3. LACKED JUSTIFICATION/LACKED PRIVILEGE. ("Lacked a justification") ("Lacked a privilege") means that the defendant's interference with the contract was improper. In deciding whether the defendant (lacked a justification) (lacked a privilege), you should consider all the following factors:

(A) the nature of the defendant's conduct;

(B) the defendant's motive;

(C) the interests of the plaintiff with which the defendant's conduct interfered;

(D) the interests sought to be advanced by the defendant;

(E) the social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff;

(F) the proximity or remoteness of the defendant's conduct to the interference; and

(G) the relations between the plaintiff and the defendant.

COMMENT

Drawn from *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 1999-Ohio-260; *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 1995-Ohio-61.

See comments (a) — (g), *Restatement of the Law 2d, Torts* (1979) § 767 for further discussion of these elements.

4. PRIVILEGE (OPTIONAL). A "privilege" is a circumstance or justification that would make the defendant's otherwise improper act(s) excusable.

COMMENT

This instruction is applicable only if the judge previously used the term "privilege."

Drawn from *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *Chandler and Assoc., Inc. v. America's Healthcare Alliance, Inc.* (1997), 125 Ohio App.3d 572; *Castillo v. Associated Pathologists*, 6th Dist. No. L-06-1076, 2006-Ohio-6459.

(Text continued on page 453)

5. FINDINGS — INTERFERENCE WITH CONTRACTUAL RELATIONSHIP BY DEFAMATION (ADDITIONAL).

COMMENT

This instruction is applicable only if the plaintiff introduces evidence of defamation and actual malice.

The plaintiff claims that even if the defendant had a (justification) (privilege), the defendant defamed plaintiff and did so with actual malice. If you find that the plaintiff has proved all the elements of his/her/ITS claim by the greater weight of the evidence except for the element of lack of (justification) (privilege), you shall find for the plaintiff if the plaintiff proved by clear and convincing evidence that the defendant defamed plaintiff and did so with actual malice.

COMMENT

Drawn from *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *Chandler and Assoc., Inc. v. America's Healthcare Alliance, Inc.* (1997), 125 Ohio App.3d 572; *Castillo v. Associated Pathologists*, 6th Dist. No. L-06-1076, 2006-Ohio-6459.

6. DEFAMATION (ADDITIONAL). OJI-CV 431.01.

7. ACTUAL MALICE (ADDITIONAL). "Actual malice" occurs when the defendant makes a false statement either with knowledge that it is false or with reckless disregard of whether it is false or not.

COMMENT

OJI-CV 431.01 § 9.

Where a tortious interference claim is based on allegations of defamatory statements, the same actual malice standard applicable to defamation applies to the interference claim. *Rizvi v. St. Elizabeth Hosp. Med. Ctr.*, 146 Ohio App.3d 103, 2001-Ohio-3412, citing *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *El-Shiekh v. Northwest Ohio Cardiology Consultants* (Sept. 15, 2000), 6th Dist. Nos. L-99-1380 and CI-97-4238. It is possible that "a different level of intent may apply to tortious interference cases not intertwined with defamation claims." *Harris v. University Hosp. of Cleveland*, 8th Dist. Nos. 76724 and 76785, 2002-Ohio-983.

8. CLEAR AND CONVINCING EVIDENCE (ADDITIONAL). OJI-CV 303.07.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

11. DAMAGES — LOST PROFITS (ADDITIONAL). Lost profits are calculated by deciding what the plaintiff was entitled to receive had the contract between the plaintiff and (*insert name of third party*) been performed. You should then add other damages, if any, suffered by the plaintiff as a result of the breach caused by the defendant's improper interference. From this sum you should subtract the amount, if any, that the plaintiff saved by not having to fully perform the contract. You may only award damages the existence and amount of which are reasonably certain and have been proved to you by the greater weight of the evidence. You may not award damages that are remote or speculative.

COMMENT

Drawn from *Try Hours, Inc. v. Swartz*, 6th Dist. No. L-06-1077, 2007-Ohio-1328.

Although unjust enrichment is not an available measure of damages in a tortious interference case, a defendant's profits obtained from the plaintiff's customers during the relevant time period(s) can provide one basis for calculating the plaintiff's damages. This measure of damages targets the plaintiff's loss (including lost profits) that arises out of the tortious interference, not the defendant's gain. Thus, "the appropriate measure of damages for lost profits [is] a compensatory damage formula, whereby lost profits are calculated by reducing the amount of revenue plaintiff would have generated, but for the tortfeasor's actions, by the costs the plaintiff would have incurred in generating such revenue." Id. at ¶ 27.

12. CONCLUSION. OJI-CV Chapter 313.

CV 453.05 Tortious interference with employment relations *[Rev. 2-23-08]*

COMMENT

A plaintiff may allege, either in addition to a wrongful discharge or other claim, that a co-employee or a third party caused him/her injury by interfering with his/her employment relationship. Generally, a plaintiff cannot assert this claim against a co-employee unless the co-employee acted solely in his/her individual capacity and personally benefited as a result of the interference. *Lennon v. Cuyahoga Cty. Juvenile Court*, 8th Dist. No. 86651, 2006-Ohio-2587, citing *Miller v. Wikel Mfg. Co., Inc.* (1989), 46 Ohio St.3d 76. See, also, *Courie v. ALCOA*, 162 Ohio App.3d 133, 2005-Ohio-3483.

Tortious interference with employment relations is but one example of interference with economic relationships, which includes tortious interference

with business relations and tortious interference with contractual relations. OJI-CV 453.01, OJI-CV 453.03. See, also, *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *Walter v. ADT Sec. Sys., Inc.*, 10th Dist. No. 06AP-115, 2007-Ohio-3324.

1. GENERAL. The plaintiff claims that the defendant (purposely) (intentionally) interfered with the plaintiff's employment relations with (*insert name of employer*) by (*describe nature of alleged interference*), and that the plaintiff was damaged as a result. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) there was an employment relationship between the plaintiff and (*insert name of employer*); and

(B) the defendant knew of the employment relationship; and

(C) the defendant acted with the (purpose) (intent) to interfere with the plaintiff's employment relationship; and

(D) the defendant lacked a (justification) (privilege); and

(E) the plaintiff was injured as a (proximate) (direct) result of the act(s) of the defendant.

COMMENT

Drawn from *Walter v. ADT Sec. Sys., Inc.*, 10th Dist. No. 06AP-115, 2007-Ohio-3324; *Doyle v. Fairfield Machine Co., Inc.* (1997), 120 Ohio App.3d 192. See, also, *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *Brookside Ambulance, Inc. v. Walker Ambulance Serv.* (1996), 112 Ohio App.3d 150; cf. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 1999-Ohio-260 (describing elements of analogous interference with contractual relations claim). But, see, *Smith v. Klein* (1985), 23 Ohio App.3d 146 (interpreting justification or privilege as an affirmative defense).

2. EMPLOYMENT RELATIONSHIP. OJI-CV 537.01.

3. LACKED JUSTIFICATION/LACKED PRIVILEGE. ("Lacked a justification") ("Lacked a privilege") means that the defendant's interference with the employment relationship was improper. In deciding whether the defendant (lacked a justification) (lacked a privilege), you should consider all the following factors:

(A) the nature of the defendant's conduct;

(B) the defendant's motive;

(C) the interests of the plaintiff with which the defendant's conduct interfered;

(D) the interests sought to be advanced by the defendant;

(E) the social interests in protecting the freedom of action of the defendant and the employment interests of the plaintiff;

(F) the proximity or remoteness of the defendant's conduct to the interference; and

(G) the relations between the plaintiff and the defendant.

COMMENT

Drawn from *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 1999-Ohio-260; *Hoyt, Inc. v. Gordon & Assoc., Inc.* (1995), 104 Ohio App.3d 598. See, also, *Walter v. ADT Sec. Sys., Inc.*, 10th Dist. No. 06AP-115, 2007-Ohio-3324; *Doyle v. Fairfield Machine Co., Inc.* (1997), 120 Ohio App.3d 192.

See comments (a) – (g), *Restatement of the Law 2d, Torts* (1979) § 767 for further discussion of these elements.

4. PRIVILEGE (OPTIONAL). A "privilege" is a circumstance or justification that would make the defendant's otherwise improper act(s) excusable.

COMMENT

This instruction is applicable only if the judge previously used the term "privilege."

Drawn from *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *Chandler and Assoc., Inc. v. America's Healthcare Alliance, Inc.* (1997), 125 Ohio App.3d 572; *Castillo v. Associated Pathologists*, 6th Dist. No. L-06-1076, 2006-Ohio-6459.

5. FINDINGS — INTERFERENCE WITH EMPLOYMENT RELATIONSHIP BY DEFAMATION (ADDITIONAL).

COMMENT

This instruction is applicable only if the plaintiff introduces evidence of defamation and actual malice.

The plaintiff claims that even if the defendant had a (justification) (privilege), the defendant defamed plaintiff and did so with actual malice. If you find that the plaintiff

has proved all the elements of his/her/its claim by the greater weight of the evidence except for the element of lack of (justification) (privilege), you shall find for the plaintiff if the plaintiff proved by clear and convincing evidence that the defendant defamed plaintiff and did so with actual malice.

COMMENT

Drawn from *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *Chandler and Assoc., Inc. v. America's Healthcare Alliance, Inc.* (1997), 125 Ohio App.3d 572; *Castillo v. Associated Pathologists*, 6th Dist. No. L-06-1076, 2006-Ohio-6459.

6. DEFAMATION (ADDITIONAL). OJI-CV 431.01.

7. ACTUAL MALICE (ADDITIONAL). "Actual malice" occurs when the defendant makes a false statement either with knowledge that it is false or with reckless disregard of whether it is false or not.

COMMENT

OJI-CV 431.01 § 9.

Where a tortious interference claim is based on allegations of defamatory statements, the same actual malice standard applicable to defamation applies to the interference claim. *Rizvi v. St. Elizabeth Hosp. Med. Ctr.*, 146 Ohio App.3d 103, 2001-Ohio-3412, citing *A & B-Abell Elevator Co., Inc. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 1995-Ohio-66 (plurality opinion); *El-Shiekh v. Northwest Ohio Cardiology Consultants* (Sept. 15, 2000), 6th Dist. Nos. L-99-1380 and CI-97-4238. It is possible that "a different level of intent may apply to tortious interference cases not intertwined with defamation claims." *Harris v. University Hosp. of Cleveland*, 8th Dist. Nos. 76724 and 76785, 2002-Ohio-983.

8. CLEAR AND CONVINCING EVIDENCE (ADDITIONAL). OJI-CV 303.07.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

11. CONCLUSION. OJI-CV Chapter 313.

CV 453.07 Tortious interference with expectancy of inheritance *[Rev. 12-5-09]*

1. GENERAL. The plaintiff claims that the defendant intentionally interfered with his/her/its expectancy of inheritance from (*insert name of decedent*) and that the

plaintiff was damaged as a result. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the plaintiff expected to inherit (money) (property) (*describe other expected inheritance*) from (*insert name of decedent*);

(B) the defendant intentionally interfered with the plaintiff's expectation;

(C) the interference was caused by (fraud) (duress) (undue influence) (*describe other tortious conduct*);

(D) but for the defendant's interference it is reasonably certain that the plaintiff would have inherited; and

(E) the plaintiff was damaged as a proximate result of the interference.

COMMENT

The Supreme Court of Ohio recognized this tort in *Firestone v. Galbreath* (1993), 67 Ohio St.3d 87, citing Restatement of the Law 2d, Torts (1979), Section 744B ("Intentional Interference with Inheritance or Gift"). See, also, *Sull v. Kaim*, 172 Ohio App.3d 297, 2007-Ohio-3269; *Grimes v. Grimes*, 173 Ohio App.3d 537, 2007-Ohio-5653; *Roll v. Edwards*, 156 Ohio App.3d 227, 2004-Ohio-767.

2. INHERITANCE. "Inheritance" means a transfer of real or personal property from (*insert name of decedent*) (under either a will or trust document) (by law to his/her heirs).

COMMENT

Drawn from Restatement of the Law 2d, Torts (1979), Section 744B.

3. INTENTIONAL CONDUCT. OJI-CV 429.05 § 3.

4. FRAUD. OJI-CV Chapter 449.

5. DURESS.

(A) "Duress" means that the defendant

(*Use appropriate alternative[s]*)

(1) physically compelled (*insert name of decedent*) to (*describe the particular act*);

(*or*)

(2) compelled (*insert name of decedent*) to (*describe the particular act*) by

communicating (*describe the alleged improper threat by defendant*) that left (*insert name of decedent*) no reasonable alternative except to (*describe the particular act*).

COMMENT

Drawn from OJI-CV 501.29 § 1 Comment.

CONSIDERATIONS APPLICABLE TO (2). In deciding whether (*describe the alleged improper threat by defendant*) compelled the (*describe the particular act*), the duress must have substantially contributed to the (*insert name of decedent*)'s decision to (*describe the particular act*). Furthermore, in deciding whether a reasonable alternative existed, you should consider the practicality of any available alternatives including legal remedies.

COMMENT

Drawn from Restatement of the Law 2d, Contracts (1981), Section 175, Comments *c and b*.

(B) In order to find duress, it is not sufficient that (*insert name of decedent*)'s difficult circumstances caused him/her to (*describe the particular act*).

6. UNDUE INFLUENCE. "Undue influence" means that which overpowers the will of a person and induces him/her into making a distribution of his/her property that he/she would not have made if left to act freely and according to his/her own plans and desires.

COMMENT

Drawn from OJI-CV 633.05 § 3; *In re Adoption of Zschach* (1996), 75 Ohio St. 3d 648.

7. REASONABLY CERTAIN. OJI-CV 315.01 (offenses committed on and after 4/7/05) § 10.

8. CONCLUSION. OJI-CV Chapter 313.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

Chapter CV 455

CIVIL RELIEF FOR CRIMINAL CONDUCT

CV 455.01 Civil remedy for person injured by criminal act *[Rev. 10/13/18]*

CV 455.01 Civil remedy for person injured by criminal act *[Rev. 10/13/18]*

COMMENT

R.C. 2307.60(A)(1) creates a statutory claim for damages resulting from any criminal act unless specifically excepted by law. R.C. 2307.60(B)(1) to (3) set forth the situations specifically excepted by law. A criminal conviction or charge is not a prerequisite. In general, persons who engaged in conduct that, if prosecuted, would constitute a felony, a misdemeanor offense of violence, an attempt to commit a felony, or an attempt to commit a misdemeanor offense of violence, are excepted from recovery if that conduct proximately caused the damages. Persons other than innocent bystanders are also excepted from recovery if the persons sustained damages from an act of self-defense, defense of another, or defense of a residence. Any person or the person's representative is excepted from recovery if the person's conduct, if prosecuted, would constitute a felony, a misdemeanor offense of violence, an attempt to commit a felony, or an attempt to commit a misdemeanor offense of violence if the conduct the person engaged in against the victim was the proximate cause of the person's damages.

See *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434.

1. GENERAL. The plaintiff claims that he/she suffered (injury) (damages) that (was) (were) proximately caused by the defendant's conduct, which constituted (*insert name of offense*).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find all of the following by the greater weight of the evidence: (*describe elements of offense with definitions*).

COMMENT

The elements from the applicable Ohio Revised Code section should be listed as the elements that the plaintiff must prove. The Committee recommends that practitioners use the OJI criminal jury instructions for the elements, definitions, and affirmative defenses. The plaintiff must prove the elements by a preponderance

of the evidence and not the criminal standard of beyond a reasonable doubt.

See R.C. 2307.60(A)(2) for the admissibility of a prior conviction.

A template of the full instruction using arson, OJI-CR 509.03(A)(1), is provided below.

3. EXAMPLE INSTRUCTION: ARSON.

(A) GENERAL. The plaintiff claims that he/she suffered (injury) (damages) proximately caused by the defendant's conduct, which constituted the criminal offense of arson.

(B) PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater of weight of the evidence that the defendant, by means of fire, knowingly caused physical harm to any property of the plaintiff without the plaintiff's consent.

(C) KNOWINGLY. OJI-CR 417.11; R.C. 2901.22(B).

(D) CAUSATION. OJI-CR 417.23.

(E) PHYSICAL HARM TO PROPERTY. "Physical harm to property" means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment. "Physical harm to property" does not include wear and tear occasioned by normal use.

COMMENT

R.C. 2901.01.

(F) PROPERTY. "Property" means any property, real or personal, tangible or intangible, and any interest or license in such property.

COMMENT

R.C. 2901.01.

4. PROXIMATE CAUSE. OJI-CV Chapter 405.

5. DAMAGES. OJI-CV Chapter 315.

COMMENT

R.C. 2307.60(A)(1) provides that anyone injured in person or property by a criminal act may recover full damages including attorney fees and punitive damages if authorized by any provision of the Rules of Civil Procedure or another

section of the Revised Code or under the common law of this state. See R.C. 2315.21 and OJI-CV Chapter 315.

In the event damages are being sought for the willful damage of property or theft, see R.C. 2307.61 for the limitation on damages.

6. CONCLUSION. OJI-CV Chapter 313.

(Text continued on page 459)

Chapter CV 457

UNAUTHORIZED DISCLOSURE OF MEDICAL INFORMATION

CV 457.01 Unauthorized disclosure of nonpublic medical information ***[Rev. 10/5/19]***

CV 457.03 Inducement of unauthorized disclosure of nonpublic medical information ***[Rev. 10/5/19]***

COMMENT

In *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115, the Supreme Court of Ohio recognized the tort of breach of confidence, which is also known as breach of confidentiality. The tort takes two forms in Ohio: (1) breach of patient confidence, also known as the unauthorized disclosure of nonpublic medical information, and (2) inducing a breach of patient confidence, also known as inducement of unauthorized disclosure of nonpublic medical information. *See Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343 (plurality). These common-law rights of action were not preempted by enactment of the federal Health Insurance Portability and Accountability Act ("HIPAA"). *Menorah Park Ctr. for Senior Living v. Rolston*, 8th Dist. Cuyahoga No. 107615, 2019-Ohio-2114.

CV 457.01 Unauthorized disclosure of nonpublic medical information *[Rev. 10/5/19]*

1. GENERAL. The plaintiff claims that the defendant has engaged in the unauthorized disclosure of nonpublic medical information.

COMMENT

Drawn from *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant was not authorized or privileged to disclose the nonpublic medical information;

(B) the nonpublic medical information was disclosed to a third-party; and

(C) the nonpublic medical information was learned by a (physician) (hospital) (*insert name of other medical provider*) within a physician-patient relationship.

COMMENT

Drawn from *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115.

The Committee believes that the physician-patient relationship can exist without direct interaction between the physician and the patient. For example, the relationship between a patient and a nurse, physician's assistant, or other person acting under a physician's supervision can create the physician-patient relationship.

3. INTENT. An unauthorized disclosure of nonpublic medical information need not be an intentional disclosure.

COMMENT

Drawn from *Scott v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-755, 12 AP-756, 12AP-757, 12AP-758, 12AP-760, 12AP-761, 12AP-762, 12AP-763, 12AP-764, and 12AP-765, 2013-Ohio-4383.

4. AFFIRMATIVE DEFENSES. OJI-CV 303.03 § 4.

(A) DISCLOSURE MANDATED BY STATUTE. The defendant claims that he/she/it disclosed the plaintiff's nonpublic medical information pursuant to the statutory mandate to (*describe statutory mandate under R.C. 3701.25, R.C. 4123.71, R.C. 3701.24, R.C. 3701.52, R.C. 3707.06, R.C. 2151.421, R.C. 2921.22 or other statute*).

COMMENT

Drawn from *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115.

(B) DISCLOSURE UNDER COMMON LAW DUTY. The defendant claims that he/she/it disclosed the plaintiff's nonpublic medical information pursuant to his/her/its duty to disclose otherwise confidential medical information concerning (the public health) (safety to third persons) (*describe common-law duty*).

COMMENT

Drawn from *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115.

(C) DISCLOSURE TO ANOTHER TREATING PHYSICIAN. The defendant claims that he/she/it disclosed the plaintiff's nonpublic medical information because he/she/it was the plaintiff's physician and was disclosing the medical information to another treating physician.

COMMENT

Drawn from *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115, citing *Neal v. Corning Glass Works Corp.*, 745 F. Supp. 1294 (S.D. Ohio 1989). This privilege applies only to disclosures made to a third party who owes a duty of confidentiality to the patient. *See id.*

(D) DISCLOSURE BY CONSENT. The defendant claims that the plaintiff consented to the release of his/her nonpublic medical information.

COMMENT

Drawn from *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115.

An attorney may be liable to an opposing party for the unauthorized disclosure of that party's medical information that was obtained through litigation. *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343 (plurality).

5. CONCLUSION. OJI-CV Chapter 313.

6. PROXIMATE CAUSE. OJI-CV 405.01.

7. DAMAGES. OJI-CV Chapter 315.

CV 457.03 Inducement of unauthorized disclosure of nonpublic medical information *[Rev. 10/5/19]*

1. GENERAL. The plaintiff claims that the defendant induced the unauthorized disclosure of nonpublic medical information.

COMMENT

Drawn from *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant (knew) (reasonably should have known) of the existence of the physician-patient relationship;

(B) the defendant (intended to) (reasonably should have anticipated that his/her/its actions would) induce a (physician) (hospital) (*insert name of other medical provider*) to disclose information about the plaintiff; and

(C) the defendant did not reasonably believe that (the physician) (the hospital) (*insert name of other medical provider*) could disclose that information to the defendant without violating the duty of confidentiality that (the physician) (the hospital) (*insert name of other medical provider*) owed to the plaintiff.

COMMENT

Drawn from *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115.

Absent a stipulation, the trial court may have to instruct the jury on the elements of unauthorized disclosure of nonpublic medical information found in OJI-CV 457.01.

3. INTENT. An unauthorized disclosure of nonpublic medical information need not be an intentional disclosure.

COMMENT

Drawn from *Scott v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 12AP-755, 12 AP-756, 12AP-757, 12AP-758, 12AP-760, 12AP-761, 12AP-762, 12AP-763, 12AP-764, and 12AP-765, 2013-Ohio-4383.

4. AFFIRMATIVE DEFENSES. OJI-CV 303.03 § 4.

(A) DISCLOSURE MANDATED BY STATUTE. The defendant claims that he/she/it disclosed the plaintiff's nonpublic medical information pursuant to the statutory mandate to (*describe statutory mandate under R.C. 3701.25, R.C. 4123.71, R.C. 3701.24, R.C. 3701.52, R.C. 3707.06, R.C. 2151.421, R.C. 2921.22, or other statute*).

COMMENT

Drawn from *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115.

(B) DISCLOSURE UNDER COMMON LAW DUTY. The defendant claims that he/she/it disclosed the plaintiff's nonpublic medical information pursuant to his/her/its duty to disclose otherwise confidential medical information concerning (the public health) (safety to third persons) (*describe common-law duty*).

COMMENT

Drawn from *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115.

(C) DISCLOSURE TO ANOTHER TREATING PHYSICIAN. The defendant claims that he/she/it disclosed the plaintiff's nonpublic medical information because he/she/it was the plaintiff's physician and was disclosing the medical information to another treating physician.

COMMENT

Drawn from *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115,

citing *Neal v. Corning Glass Works Corp.*, 745 F.Supp. 1294 (S.D. Ohio 1989). This privilege applies only to disclosures made to a third party who owes a duty of confidentiality to the patient. *See id.*

(D) DISCLOSURE BY CONSENT. The defendant claims that the plaintiff consented to the release of his/her nonpublic medical information.

COMMENT

Drawn from *Biddle v. Warren Gen. Hosp.*, 86 Ohio St.3d 395, 1999-Ohio-115.

An attorney may be liable to an opposing party for the unauthorized disclosure of that party's medical information that was obtained through litigation. *Hageman v. Southwest Gen. Health Ctr.*, 119 Ohio St.3d 185, 2008-Ohio-3343 (plurality).

5. CONCLUSION. OJI-CV Chapter 313.
6. PROXIMATE CAUSE. OJI-CV 405.01.
7. DAMAGES. OJI-CV Chapter 315.

TITLE 5

CIVIL SUBJECT MATTER INSTRUCTIONS: CONTRACT-RELATED ISSUES

Chapter CV 501 CONTRACTS

Chapter CV 505 UNIFORM COMMERCIAL CODE [SALES]

Chapter CV 509 GUARANTY

Chapter CV 513 SURETIES

Chapter CV 517 UNIFORM COMMERCIAL CODE [SECURED TRANSACTIONS]

Chapter CV 521 CONSUMER SALES PRACTICES ACT

Chapter CV 525 RESIDENTIAL LENDING PRACTICES

Chapter CV 529 NONCONFORMING MOTOR VEHICLE (LEMON LAW)

Chapter CV 533 DISCRIMINATION

Chapter CV 537 EMPLOYMENT RELATIONS

Chapter CV 541 SECURITIES

Chapter CV 501

CONTRACTS

CV 501.01 Plaintiff's claim

CV 501.03 Contract formation

CV 501.05 Offer and acceptance

CV 501.07 Contract interpretation

CV 501.09 Modification of contract *[Rev. 1/20/18]*

CV 501.11 Affirmative defense: mutual mistake of fact

CV 501.13 Affirmative defense: unilateral mistake of fact

CV 501.15 Affirmative defense: frustration of purpose

CV 501.17 Affirmative defense: impracticability

CV 501.19 Affirmative defense: impracticability due to government action

CV 501.21 Affirmative defense: prevention of performance

CV 501.23 Affirmative defense: payment (satisfaction)

CV 501.25 Affirmative defense: accord and satisfaction *[Rev. 2-24-07]*

CV 501.27 Affirmative defense: waiver *[Rev. 1/20/18]*

CV 501.29 Affirmative defense: duress *[Rev. 4/28/18]*

CV 501.31 Promissory estoppel *[Rev. 2-21-09]*

CV 501.33 Expectation damages *[Rev. 3-28-09]*

CV 501.35 Reliance damages

CV 501.37 Rescission and restitution

CV 501.39 Quantum meruit: mistake/implied in fact contract

CV 501.01 Plaintiff's claim

1. PLAINTIFF'S CLAIM. The plaintiff claims that the defendant entered into a contract with him/her/it (to) (for) (*insert subject matter of contract*) and that the defendant (broke) (breached) the contract causing the plaintiff (damages) (loss).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the parties entered into a contract, and

(B) the defendant (broke) (breached) the contract by (*insert nature of breach[es] claimed by the plaintiff*), and

Chapter CV 501

CONTRACTS

CV 501.01 Plaintiff's claim

CV 501.03 Contract formation

CV 501.05 Offer and acceptance

CV 501.07 Contract interpretation

CV 501.09 Modification of contract *[Rev. 1/20/18]*

CV 501.11 Affirmative defense: mutual mistake of fact

CV 501.13 Affirmative defense: unilateral mistake of fact

CV 501.15 Affirmative defense: frustration of purpose

CV 501.17 Affirmative defense: impracticability

CV 501.19 Affirmative defense: impracticability due to government action

CV 501.21 Affirmative defense: prevention of performance

CV 501.23 Affirmative defense: payment (satisfaction)

CV 501.25 Affirmative defense: accord and satisfaction *[Rev. 2-24-07]*

CV 501.27 Affirmative defense: waiver *[Rev. 1/20/18]*

CV 501.29 Affirmative defense: duress *[Rev. 4/28/18]*

CV 501.31 Promissory estoppel *[Rev. 2-21-09]*

CV 501.33 Expectation damages *[Rev. 3-28-09]*

CV 501.35 Reliance damages

CV 501.37 Rescission and restitution

CV 501.39 Quantum meruit: mistake/implied in fact contract

CV 501.01 Plaintiff's claim

1. PLAINTIFF'S CLAIM. The plaintiff claims that the defendant entered into a contract with him/her/it (to) (for) (*insert subject matter of contract*) and that the defendant (broke) (breached) the contract causing the plaintiff (damages) (loss).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the parties entered into a contract, and

(B) the defendant (broke) (breached) the contract by (*insert nature of breach[es] claimed by the plaintiff*), and

COMMENT

A plaintiff is entitled to recover damages for a breach by the defendant, whether or not the breach is material. See Ashley v. Henahan (1897), 56 Ohio St. 559, 47 N.E. 573. However, if the defendant's breach is not material, the plaintiff is not excused from performing his/her duties under the contract. See Restatement of the Law 2d, Contracts (1981) § 237.

(C) the plaintiff (as not in material breach of) (had substantially performed his/her/its duties due under) the contract at the time of the defendant's breach, and

COMMENT

Substantial performance and the lack of a material breach are two sides of the same coin. The facts of the case, however, may make one form preferable. For example, using the language "was not in material breach of the contract at the time of the defendant's breach" may be less confusing where the plaintiff's performance has not yet occurred but has been excused by the defendant's own material breach of the contract.

(D) (ADDITIONAL ELEMENT IF APPLICABLE). (*Describe any condition precedent to the defendant's duties.*)

COMMENT

Element (D) will frequently not be in dispute because the contract contains no conditions precedent to the defendant's duties other than the plaintiff's own performance. In such cases this element can be eliminated.

3. BREACH. A contract is (breached) (broken) when one party fails or refuses to perform his/her/its duties under the contract.

4. MATERIAL BREACH. "Material breach" by plaintiff means a breach that violates a term essential to the purpose of the contract. Mere nominal, trifling, slight or technical departures from the contract terms are not material breaches so long as they occur in good faith.

COMMENT

Ashley v. Henahan (1897), 56 Ohio St. 559, 47 N.E. 573; Clearing House, Inc. v. Intrak (1990), 66 Ohio App. 3d 163, 583 N.E.2d 1056; Cleveland Neighborhood Health Serv., Inc. v. St. Clair Builders, Inc. (1989), 64 Ohio App. 3d 639, 582

N.E.2d 640, *appeal dismissed*, 50 Ohio St.3d 705, 553 N.E.2d 692 (1990).

(Text continued on page 461)

Some Ohio courts have also utilized the following five factors listed in the Restatement of the Law 2d, Contracts (1981) § 241 in deciding whether a breach is material. The five factors are: (1) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (2) the extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived; (3) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (4) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (5) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

5. SUBSTANTIAL PERFORMANCE. "Substantial performance" by plaintiff means the absence of a breach that violates a term essential to the purpose of the contract. "Substantial performance" may include mere nominal, trifling, slight or technical departures from the contract terms so long as the plaintiff acts in good faith.

6. GOOD FAITH. "Good faith" means honesty in fact in the conduct or transaction.

COMMENT

Drawn from R.C. 1301.01(S) (U.C.C. 1-201 (9)).

7. CONCLUSION FOR PLAINTIFF. If you find by the greater weight of the evidence that the plaintiff proved his/her/its claim, then you must further decide whether the defendant's breach caused the plaintiff to suffer any damages and, if so, in what amount.

8. CONCLUSION FOR DEFENDANT. If you find by the greater weight of the evidence that the plaintiff failed to prove any part of his/her/its claim (or that the defendant proved by the greater weight of the evidence that [*insert applicable affirmative defense*]), then you will find for the defendant.

9. EXPECTATION DAMAGES. OJI-CV 501.33.

CV 501.03 Contract formation

1. DEFINITION. A "contract" is an agreement or obligation, whether verbal or written, in which one party becomes (bound) (obligated) to another to pay a sum of money or to perform or omit to do a certain act or acts. It is not necessary that the parties use any particular words, perform any particular acts, or use any particular form of agreement in order to create a contract.

COMMENT

Drawn from *Terex Corp. v. Grim Welding Co.* (1989), 58 Ohio App. 3d 80, 568

N.E.2d 739; *National Glass and Lens Co. v. Parsons* (1928), 28 O.L.R. 573 (Ohio App.). Ohio courts have adopted numerous definitions of the term "contract." The one stated in the instruction, however, has been used in many recent cases and is most consistent with modern contract law. Recent decisions have also adopted the definition in the Restatement of the Law 2d, Contracts (1981) § 1, which is "a promise or set of promises for which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." See *Brownfield, Bowden, Bally, and Sturtz v. Board of Education* (1977), 56 Ohio App. 2d 10, 381 N.E.2d 207; *Schenley v. Kauth* (1953), 96 Ohio App. 345, 122 N.E.2d 189.

2. FORMATION. In order to form a contract the parties must mutually consent to the agreement(s) or obligation(s) undertaken by them. Mutual consent arises out of the intent of the parties as shown by the reasonable meaning of their words and conduct, and not from any unexpressed intention or understanding of either party. In deciding whether there was mutual consent, you should consider not only the words and conduct of the parties, but also the circumstances under which the words were used and the conduct occurred.

COMMENT

Ford v. Tandy Transp. Inc. (1993), 86 Ohio App.3d 364, 620 N.E.2d 996; *Schon v. Estate of Richardson* (June 2, 1983), Cuyahoga App. No. 44765, unreported, 1983 Ohio App. LEXIS 12346.

Many Ohio decisions require that there be a "meeting of the minds" in order for there to be mutual consent. Ohio law is also clear, however, that this standard is objective and does not require that there be subjective agreement by the parties. The "meeting of the minds" language is not used in this instruction because the Committee believes that it is potentially misleading and no longer appears in modern contract doctrine, and that the instruction as written accurately conveys Ohio law. Should the trial judge prefer to use the "meeting of the minds" language, he/she should be certain that it is clear to the jury that a "meeting of the minds" is determined by the standard of a reasonable person based on the objective manifestations of the parties.

The requirement of consideration is not specifically included in the instruction because whether or not a promise or performance constitutes consideration will be decided by the judge as a matter of law. If a question of fact exists as to whether a promise was made or, in the case of a unilateral contract, a performance done, this will generally be covered by this instruction on contract formation.

3. EXPRESS AND IMPLIED CONTRACTS. A contract may be an express or implied. An express contract is created by the words or writings of the parties. An implied contract arises from the parties' acts or conduct.

CV 501.05 Offer and acceptance

COMMENT

Mutual consent often occurs through the process of offer and acceptance, although in many cases contracts will be concluded in a manner that will make it impossible to clearly identify an offeror or offeree, and in other cases it will be unnecessary to do so. In some cases, however, whether mutual consent exists is determined by specific rules regarding offer and acceptance. The trial judge can use this instruction to supplement OJI-CV 501.03 where it is necessary to do so.

1. OFFER. Mutual consent may occur through an offer and acceptance. The plaintiff claims that (the plaintiff made an offer that was accepted by the defendant) (the defendant made an offer that was accepted by the plaintiff). An offer indicates a willingness to enter into a bargain, so that a reasonable person would understand that their consent to that bargain is invited and will conclude it.

COMMENT

Ford v. Tandy Transp., Inc. (1993), 86 Ohio App.3d 364, 620 N.E.2d 996; *Leaseway Distribution Centers, Inc. v. Dept. of Admin. Serv.* (1988), 49 Ohio App.3d 99, 550 N.E.2d 955; *Foster v. Ohio State University* (1987), 41 Ohio App.3d 86, 534 N.E.2d 1220.

2. ACCEPTANCE. The plaintiff claims that (the plaintiff accepted the offer made by the defendant) (the defendant accepted the offer made by the plaintiff). Acceptance may be made by word, sign, writing, or act. Unless the offer indicates that a particular manner of acceptance is required, an offer can be accepted in any manner that is reasonable under the circumstances. However, where a particular manner of acceptance is required by the offer, an acceptance made in some other manner is not effective to establish mutual consent.

COMMENT

Nilavar v. Osborn (1998), 127 Ohio App.3d 1, 711 N.E.2d 726; Restatement of the Law 2d, Contracts (1981) § 30. See also R.C. § 1302.09 (U.C.C. 2-206).

3. TIMELINESS OF ACCEPTANCE. The plaintiff claims that (the plaintiff accepted the offer made by defendant) (the defendant accepted the offer made by the plaintiff) while the offer was still open. To be effective, the acceptance must have been communicated to the person making the offer or to someone authorized to receive the acceptance on behalf of the person making the offer. You must decide by the greater

weight of the evidence whether the offer was accepted before

(*Use appropriate alternative[s]*)

(A) (*insert time at which offer lapsed or was revoked*)

(or)

(B) the passage of a reasonable time from the time the offer was communicated to the (plaintiff) (defendant) (person authorized to accept the offer on behalf of the [plaintiff] [defendant]).

COMMENT

If there is a question as to whether the arrival of an acceptance at a particular place or to the attention of a particular person has been communicated to the offeror, an appropriate instruction must be given. See R.C. § 1301.01(AA) (U.C.C. 1-201(27)). If there is an issue as to when or if revocation occurred, see § 5 below.

4. ACCEPTANCE BY MAIL OR SIMILAR MEANS OF TRANSMISSION. If you decide that acceptance of the offer by (mail) (*insert similar means of transmission*) a reasonable manner in which to accept the offer, the acceptance is effective at the time the acceptance (is deposited in the mail) (*insert time at which the acceptance was given to the carrier for transmission* whether or not it reaches the intended recipient. In order for the acceptance to be effective at the time it (is mailed) (*insert time at which the acceptance was given to the carrier for transmission*), it must have been properly addressed and posted.

COMMENT

Ohio courts appear to have adopted the "mailbox rule" under which an acceptance by mail is effective when deposited in the mailbox, although the Ohio Supreme Court has not directly so held. See *Adams v. Colonial Ins. Co.* (1997), 121 Ohio App.3d 122, 699 N.E.2d 112; *Casto v. State Farm Mut. Ins. Co.* (1991), 72 Ohio App.3d 410, 594 N.E.2d 1004.

Ohio courts have generally not had the opportunity to determine whether the mailbox rule extends to similar methods of communication. The Restatement of the Law 2d, Contracts (1981) § 63 takes the position that the mailbox rule applies to any acceptance made in a manner and medium invited by the offeror. Ohio courts have given no indication how far they will extend the mailbox rule, but the Committee believes that it would at least be applied to means of communication similar to the mail (e.g., FedEx). See *Livingston v. Klopper* (1884), 9 O. Dec. Rep. 185 (telegram). No Ohio court has determined the applicability of the mailbox rule to electronic transmissions.

5. REVOCATION OF OFFER. The plaintiff claims that the plaintiff accepted the defendant's offer before it was revoked by the defendant. Revocation occurs when an offer is withdrawn and is only effective when communicated to the person(s) to whom the offer was made. You must decide by the greater weight of the evidence if the offer was revoked before the plaintiff accepted it.

COMMENT

The "mailbox rule" does not apply to revocations of offers; revocations of offers must be received by the offeror to be effective. See *Livingston v. Klopper* (1884), 9 O. Dec. Rep. 185 (telegram); *Settles v. West Shell, Inc.*, (1st App. Dist., Nov. 28, 1984), 1984 WL 7081, Appeal No. C-830907; Restatement of the Law 2d, Contracts (1981) § 42.

CV 501.07 Contract interpretation

COMMENT

Where contract language is clear and unambiguous, interpretation of the agreement involves an issue of law and it is error to submit its interpretation to the trier of fact. *Digioia Bros. Excavating, Inc. v. Cleveland Dept. of Pub. Util., Div. Of Water* (1999), 135 Ohio App.3d 436, 734 N.E.2d 438; *Wolfer Ent., Inc. v. Overbrook Development Corp.* (1999), 132 Ohio App.3d 353, 724 N.E.2d 1251. Where the language of the contract is ambiguous, however, Ohio law is less clear. There are many cases that categorically state that contract interpretation is a matter of law for the courts, and at least one which states that contract interpretation is a matter of law for the court even when the language is ambiguous. See *Logsdon v. Fifth Third Bank of Toledo* (1994), 100 Ohio App.3d 333, 654 N.E.2d 115. Most of these cases, however, involve factual situations where the language is unambiguous. In cases involving ambiguous language, most Ohio courts, and modern contract doctrine generally, treat its interpretation as a question of fact for the jury. The Committee believes that this is the proper approach. See, e.g., *Valmac Indus., Inc. v. Ecotech Machinery, Inc.* (2000), 137 Ohio App.3d 408, 738 N.E.2d 873; *Indiana Ins. Co. v. Carnegie Const., Inc.* (1995), 104 Ohio App.3d 219, 661 N.E.2d 776; *Jaworowski v. Radiation Medical Consultants* (1991), 71 Ohio App.3d 320, 594 N.E.2d 9.

1. GENERAL. The parties disagree as to the meaning of certain language in the contract. The plaintiff claims that (*describe plaintiff's understanding of disputed language*). The defendant claims that (*describe defendant's understanding of disputed language*). You must decide from all of the facts and circumstances in evidence what the parties intended the disputed language to mean.

2. INTENT OF THE PARTIES. You will decide the intention of the parties by viewing the contract as a whole, considering the subject matter and apparent purpose

of the contract, all of the facts and circumstances in evidence surrounding the contract, and the reasonableness of the respective interpretations offered by the parties. You will decide their intention by giving the words of the contract their plain, ordinary, and reasonable meaning, unless the facts and circumstances in evidence surrounding the contract indicate that the parties intended a different meaning. You are not to decide the parties' intent from any unexpressed intention or understanding of either party. Words that have acquired a particular meaning in the (trade) (profession) in which the parties are engaged will normally be given that meaning.

COMMENT

Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth. (1997), 78 Ohio St.3d 353, 678 N.E.2d 519. The uncommunicated subjective intentions of one party have no significance in determining the meaning of disputed terms and admission of evidence of such is error. *Myers v. Sunlight Laundry Co.* (1918), 10 Ohio App. 275; *Woods v. Fifth-Third Union Trust Co.* (1936), 54 Ohio App. 303; *Herder v. Herder* (1972), 32 Ohio App.2d 75; *G.F. Business Equip., Inc. v. Liston* (1982), 7 Ohio App.3d 223; *Camardo v. Timm* (December 13, 1990), 1990 Cuyahoga App. No. 57795, unreported, 1990 Ohio App. LEXIS 5500; *Board of County Comm'rs v. Flanco Realty Co.* (June 25, 1999), 1999 Hamilton App. No. C-980781, 980803, 980822, unreported, 1999 Ohio App. LEXIS 2890; *Guerrero v. Guerrero* (February 15, 1991), Trumbull App. No. 90-T-4354, unreported, 1991 Ohio App. LEXIS 678.

CV 501.09 Modification of contract *[Rev. 1/20/18]*

COMMENT

The Committee believes that the appropriate burden of proof for contract modification is a preponderance of the evidence. *White Co. v. Canton Transp. Co.*, 131 Ohio St. 190 (1936); *Cleveland Metal Bed Co. v. Kutz*, 27 Ohio App. 245 (8th Dist. 1928); *Coldwell Banker Residential Real Estate Servs. v. Sophista Homes, Inc.*, 2d Dist. Montgomery No. CA-13191, 1992 Ohio App. LEXIS 5474 (Oct. 26, 1992). *But see, e.g., Ludwig v. Lydick*, 7th Dist. Monroe No. MO9, 2011-Ohio-5164; *Russell v. Daniels-Head & Assoc., Inc.*, 4th Dist. Scioto No. 1600, 1987 Ohio App. LEXIS 7970 (June 30, 1987) (requiring clear and convincing evidence).

1. GENERAL. A contract may be (modified) (changed) upon the mutual agreement of the parties and may occur (through words or conduct) (expressly or by implication). The (plaintiff) (defendant) claims that the parties modified their contract in the following way (*describe alleged modification*). The (plaintiff) (defendant) must prove by the greater weight of the evidence that the parties agreed to modify their contract.

COMMENT

No consideration is necessary to modify a contract for the sale of goods. R.C. § 1302.12(A) (U.C.C. 2-209). See also OJI-CV 505.09. Consideration is required to modify other contracts. *Trader v. People Working Cooperatively*, 104 Ohio App. 3d 690 (1994); *Richland Builders v. Thome*, 88 Ohio App. 520 (1950); *Synergy Mech. Constrs. v. Kirk Williams Co.*, 10th Dist. Franklin No. 98AP-431 (Dec. 22, 1998). However, a modification without consideration will be enforced if a party relies on the modification and a refusal to enforce the modification would result in fraud or injury to the promisee. *Mehurin v. Stone*, 37 Ohio St. 49 (1881); *Software Clearing House, Inc. v. Intrak, Inc.*, 66 Ohio App.3d 163 (1990). *See also* OJI-CV 501.31.

2. EXPRESS AND IMPLIED CONTRACTS. OJI-CV 501.03 § 3.

CV 501.11 Affirmative defense: mutual mistake of fact

COMMENT

Mutual mistake of fact, and numerous other doctrines such as unilateral mistake, impossibility, and frustration of purpose are usually denominated as excuses rather than as affirmative defenses. Like affirmative defenses, however, the party seeking to resist the enforcement of the contract has the burden of proof of establishing the excuse. For simplicity's sake, all such defenses are described as affirmative defenses pursuant to Civ. R. 8 (C).

1. GENERAL. OJI-CV 303.03 § 4.

COMMENT

In the case of a release of liability, e.g., the settlement of a personal injury claim, mutual mistake must be proved by clear and convincing evidence. *Sloan v. Standard Oil Co.* (1964), 177 Ohio St. 149, 203 N.E.2d 237. The same standard of proof is applicable to the reformation of a written instrument or deed. *Mason v. Swartz* (1991), 76 Ohio App.3d 43, 600 N.E.2d 1121. However, the standard of proof for one seeking excuse from performing any other form of contract on the basis of mutual mistake of fact is not clear. While two Ohio cases, *Lusardo v. Broadview Savings & Loan Co.* (March 14, 1991), Cuyahoga App. No. 58147, unreported, 1991 Ohio App. LEXIS 1073 and *Small v. Ritchey* (November 6, 1985), Summit App. No. 12119, unreported, 1985 Ohio App. LEXIS 9224, indicate without discussion, that the standard is clear and convincing evidence, most jurisdictions outside Ohio apply a preponderance of the evidence standard in cases not involving a release of liability or the reformation of a written instrument. The Committee believes that a preponderance of the evidence is the appropriate

standard of proof in such cases.

2. MUTUAL MISTAKE OF FACT. The defendant claims that he/she/it is excused from performing the contract because of a mutual mistake of fact. If all of the requirements of mutual mistake are proved, then the defendant is excused from performing the contract. A "mutual mistake of fact" occurs when

(A) both parties were mistaken as to a fact that is material to the contract; and

(B) the defendant was not negligent in failing to discover the mistake.

Nevertheless, if the plaintiff proved by the greater weight of the evidence that the defendant was aware at the time the contract was made that he/she/it had only limited knowledge with respect to the facts to which the mistake relates and treated his/her/its limited knowledge as sufficient, you must find that the defendant has failed to establish the affirmative defense of mutual mistake of fact.

COMMENT

Drawn from *Reilley v. Richards* (1994), 69 Ohio St.3d 352, 632 N.E.2d. 507 and the Restatement of the Law 2d, Contracts (1981) §§ 152, 154. See *J.A. Indus. v. All Am. Plastics, Inc.* (1999), 133 Ohio App.3d 76, 726 N.E.2d 1066.

3. MATERIAL. A mistake is material to a contract when it is a mistake as to a basic assumption on which the contract was made and has a substantial effect on the agreed exchange of performances required by the contract.

COMMENT

Drawn from *Reilley v. Richards* (1994), 69 Ohio St.3d 352, 632 N.E.2d 507.

4. NEGLIGENT. "Negligence" means the failure to use ordinary care. Ordinary care is the care that a reasonably careful person would use under the same or similar circumstances.

COMMENT

Drawn from OJI-CV 401.01 §§ 1 and 2.

CV 501.13 Affirmative defense: unilateral mistake of fact

COMMENT

The Ohio Supreme Court has never fully addressed the requirements necessary

for excuse based on unilateral mistake of fact, although a dissent in a recent case assumed the applicability of the criteria in the Restatement of the Law 2d, Contracts (1981) §§ 153, 154. See *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, 683 N.E.2d 337 (dissenting opinion of Cook, J.). A number of Ohio appellate cases have applied the criteria of the Restatement in deciding whether a party can get relief for a unilateral mistake of fact. See, e.g., *General Tire, Inc. v. Mehlfledt* (June 23, 1999) Summit App. No. 19269, unreported, 1999 Ohio App. LEXIS 2970; *Zimmerman v. U.S. Diamond & Gold Jewelers, Inc.* (March 8, 1995) Montgomery App. No. 14680, unreported, 1995 Ohio App. LEXIS 901. Since the Supreme Court has consistently adopted the Restatement in other

(Text continued on page 469)

areas of contract law, the Committee believes that the applicable criteria for unilateral mistake of fact are those contained in the Restatement.

The Ohio cases are unclear as to when a party's own negligence will prevent that party from relying on the excuse of unilateral mistake of fact. There are some cases that state without qualification that a party's own negligence will prevent unilateral mistake from being an excuse. See, e.g., *Convenient Food Mart, Inc. v. CON., Inc.* (September 30, 1996), Lake App. No. 95-L-093, unreported, 1996 Ohio App. LEXIS 4338; *Carucci v. John Hancock Mutl. Life Ins., Co.* (1968), 15 Ohio App.2d 1, 238 N.E.2d 572. Other cases have adopted the position that a mistaken party's negligence can, but will not necessarily, bar relief. See *General Tire, Inc. v. Mehlfeldt, supra*; *Leizart v. Leizart* (October 2, 1991), Summit App. No. 15031, unreported, 1991 Ohio App. LEXIS 4717; *Green Local Teachers Assn. v. Blevins* (1987), 43 Ohio App.3d 71, 539 N.E.2d 653. Because the Ohio Supreme Court in *Reilley v. Richards* (1994), 69 Ohio St.3d 352, 632 N.E.2d 507, stated in the context of mutual mistake that the negligence of a mistaken party will bar relief, the Committee sees no reason to distinguish the cases of mutual and unilateral mistake of fact, and has drafted these instructions accordingly.

The standard of proof necessary for prevailing on the affirmative defense of unilateral mistake of fact is not entirely clear. Where the mistake that is asserted is that a writing does not reflect the true agreement of the parties (rescission or reformation), the proper standard is clear and convincing evidence See, e.g., *General Tire, Inc. v. Mehlfeldt, supra*; Comment to OJI-CV 501.13. Where the mistake of fact involves something other than a mistaken writing, the Committee believes that the appropriate standard is the greater weight of the evidence.

1. GENERAL. OJI-CV 303.03 § 4.

2. UNILATERAL MISTAKE OF FACT. The defendant claims that he/she is excused from performing the contract because of a unilateral mistake of fact. If all of the requirements of unilateral mistake are proved, then the defendant is excused from performing the contract. A "unilateral mistake of fact" occurs when

(A) the defendant was mistaken as to a fact that is material to the contract; and

(B) the defendant was not negligent in failing to discover the mistake; and

COMMENT

Drawn from *Reilley v. Richards* (1994), 69 Ohio St.3d 352, 632 N.E.2d 507 and the Restatement of the Law 2d, Contracts (1981) §§ 153, 154. See *J.A. Indus. v. All Am. Plastics, Inc.* (1999), 133 Ohio App.3d 76, 726 N.E.2d 1066.

(C) the plaintiff knew or had reason to know of the defendant's mistake or negligently caused the mistake.

COMMENT

In addition to the elements stated in the instruction § 153 of the Restatement 2d, of Contracts, also requires either that the plaintiff have reason to know of the mistake or the plaintiff's negligence cause the mistake. Whether the plaintiff had reason to know of the mistake is clearly a question of fact. It is not clear under the Restatement, however, whether the issue of unconscionability is an issue for the judge or jury, and no Ohio case has addressed this issue. Generally, however, the issue of unconscionability is to be decided by the judge. See Restatement of Law 2d, Contracts § 208; R.C. § 1302.15 (U.C.C. § 2-302). Consequently, the Committee has omitted any reference to this alternative from the instruction. In addition, this instruction has been drafted to require the jury to reach a separate finding on the question of whether the plaintiff had reason to know of the mistake or caused the mistake through negligence. If the jury finds that the other elements of unilateral mistake are present but does not find that the plaintiff knew or should have known of the mistake, the judge must determine whether enforcement against the mistaken party would be unconscionable.

Nevertheless, if the plaintiff proved by the greater weight of the evidence that the defendant was aware at the time the contract was made that he/she/it had only limited knowledge with respect to the facts to which the mistake relates and treated his/her/its limited knowledge as sufficient, you must find that the defendant has failed to establish the affirmative defense of unilateral mistake of fact.

3. MATERIAL. A mistake is material to a contract when it is a mistake as to a basic assumption on which the contract was made and that has a substantial effect on the agreed exchange of performances.

COMMENT

Reilley v. Richards (1994), 69 Ohio St.3d 352, 632 N.E.2d 507.

4. NEGLIGENT/NEGLIGENTLY. "Negligence" means the failure to use ordinary care. Ordinary care is the care that a reasonably careful person would use under the same or similar circumstances.

COMMENT

Drawn from OJI-CV Chapter 405 and OJI-CV 401.07.

5. CAUSED. "Caused" means an act or failure, which in the natural and continuous sequence, directly produced the mistake and without which the mistake would not have occurred. The mistake must have been the natural and foreseeable result of the

plaintiff's negligence. The test for foreseeability is whether under the circumstances in evidence a reasonably careful person would have anticipated the defendant's mistake.

COMMENT

Drawn from OJI-CV Chapter 405 and OJI-CV 401.07.

CV 501.15 Affirmative defense: frustration of purpose

COMMENT

The difference between the defense of frustration of purpose and the defense of impracticability is that frustration of purpose, unlike impracticability, does not impair the ability of the parties to perform. Rather, it makes performance of one of the parties virtually worthless to the other party.

Very few Ohio cases have addressed the defense of frustration of purpose, and it has never been addressed by the Ohio Supreme Court. Only one unreported case has described the elements necessary to establish the defense. See *Mahoning National Bank of Youngstown, Ohio v. State ex rel. Brown* (May 27, 1976), Franklin App. No. 75AP-532, unreported, 1976 Ohio App. LEXIS 6413 (adopting tentative draft of Restatement of the Law 2d, Contracts (1981) § 285). However, the extant case law appears to assume that such a defense exists in Ohio. See *Wilharm v. M.J. Construction Co.* (1997), 118 Ohio App.3d 531, 693 N.E.2d 830. Further, Ohio has clearly adopted the defense of impracticability, which is doctrinally very similar to frustration of purpose. In the absence of guidance by Ohio courts, this instruction is based upon the Restatement of the Law 2d, Contracts (1981) § 265.

The leading case on frustration of purpose is Krell v. Henry [1903], 2 K.B. 740, where the plaintiff leased two rooms to watch the coronation of King Edward VII, which was cancelled shortly before the scheduled time as a result of the King's illness.

1. GENERAL. OJI-CV 303.03 § 4.

2. FRUSTRATION OF PURPOSE. The defendant claims that he/she/it is excused from performing the contract because the purpose of the contract was frustrated by (*describe frustrating event*). If all of the requirements of frustration of purpose are proved, then the defendant is excused from performing the contract. "Frustration of purpose" occurs when

(A) the defendant's principal purpose for making the contract was frustrated by (*describe frustrating event*); and

(B) the frustration is substantial; and

(C) it was a basic assumption of the parties at the time they entered into the contract

that (*describe frustrating event*) would not occur; and

(D) the frustration of purpose was not the fault of the defendant.

3. PRINCIPAL PURPOSE. The "principal purpose" of the contract must be so completely the basis of the contract that without it the contract makes little sense.

COMMENT

See Restatement of the Law 2d, Contracts (1981) § 265, Comment a.

4. FORESEEABILITY. In deciding whether it was the basic assumption of the parties that (*describe frustrating event*) would not occur, you should take into account the extent to which the event was foreseeable and all other facts and circumstances in evidence.

COMMENT

See Restatement of the Law 2d, Contracts (1981) § 265, Comment a. Foreseeability is specifically mentioned in the instruction for two reasons: (1) it is generally the most significant factor in deciding whether frustration of purpose exists, and (2) to advise the jury that they can find frustration of purpose even if the event was foreseeable.

CV 501.17 Affirmative defense: impracticability

COMMENT

Modern contract law has incorporated the doctrine of impossibility of performance into the broader concept of impracticability of performance. Early law required that performance be literally impossible for an excuse to be available. Modern law only requires that performance be impracticable, which necessarily includes impossibility.

1. GENERAL. OJI-CV 303.03 § 4.

2. IMPRACTICABILITY OF PERFORMANCE. The defendant claims that he/she/it is excused from performing the contract because the defendant's performance has become impracticable as a result of (*describe event*). If all of the requirements for impracticability are proved, then the defendant is excused from performing the contract. Impracticability of performance occurs when

(A) performance of the contract by the defendant has become impracticable because of (*describe event*); and

(B) it was a basic assumption of the parties at the time they entered into the contract that (*describe event*) would not occur; and

(C) the impracticability of performance was not the fault of the defendant.

3. IMPRACTICABILITY. "Impracticability" means that the contract could not be performed by the defendant, or could only be performed by the defendant with extreme and unreasonable difficulty, expense, or risk of injury. The mere fact that performance became more difficult or expensive than the defendant originally anticipated does not justify a finding that performance was impracticable.

COMMENT

See *Transatlantic Finance Corp. v. United States* (D.C. Cir 1966), 363 F.2d 312, 3 UCCR 401; Restatement of the Law 2d, Contracts (1981) § 261, Comment a. See also *State ex rel. Jewett v. Sayre* (1914), 91 Ohio St. 85, 109 N.E. 636.

4. FORESEEABILITY. In deciding whether it was the basic assumption of the parties that (*describe event*) would not occur, you should take into account the extent to which the event was foreseeable and all other facts and circumstances in evidence.

COMMENT

See Restatement of the Law 2d, Contracts (1981) § 261, Comment a. Foreseeability is specifically mentioned in the instruction for two reasons: (1) it is generally the most significant factor in deciding whether impracticability exists, and (2) to advise the jury that they can find impracticability even if the event was foreseeable.

CV 501.19 Affirmative defense: impracticability due to government action

COMMENT

Modern contract law has incorporated the doctrine of impossibility of performance into the broader concept of impracticability of performance. Early law required that performance be literally impossible for an excuse to be available. Modern law only requires that performance be impracticable, which necessarily includes impossibility.

1. GENERAL. OJI-CV 303.03 § 4.

2. IMPRACTICABILITY DUE TO GOVERNMENT ACTION. The defendant claims that he/she/it is excused from performing the contract because the defendant's

performance has become impracticable as a result of (*describe government action*). If all of the requirements for impracticability are proved, then the defendant is excused from performing the contract. Impracticability of performance occurs when

(A) it has become impracticable for the defendant to legally perform his/her/its contract because of (*describe government action*); and

(B) it was a basic assumption of the parties at the time they entered into the contract that (*describe government action*) would not occur.

COMMENT

See *Glickman v. Coakley* (1984), 22 Ohio App.3d 49, 488 N.E.2d 906; *Truetried Service Co. v. Hager* (1997), 118 Ohio App.3d 78, 691 N.E.2d 1112; *Bank One, Marion v. Marion, Ohio, Internal Medicine, Inc.* (March 31, 1997), Marion App. No. 9-96-69, unreported, 1997 Ohio App. LEXIS 1601.

This instruction does not include the requirement in OJI-CV 501.17 that the impracticability of performance not be the fault of the defendant. Because the supervening event in the present instruction is an action of the government, the defendant will almost never have caused the event that made his performance impracticable. Should this occur, however, the trial judge can draft an appropriate instruction based upon OJI-CV 501.17.

3. IMPRACTICABILITY. "Impracticability" means that the contract could not be performed by the defendant, or could only be performed by the defendant with extreme and unreasonable difficulty, expense, or risk of injury. The mere fact that performance became more difficult or expensive than the defendant originally anticipated does not justify a finding that performance was impracticable.

4. FORESEEABILITY. In deciding whether it was the basic assumption of the parties that (*describe government action*) would not occur, you should take into account the extent to which the government action was foreseeable and all other facts and circumstances in evidence.

COMMENT

Some cases dealing with impracticability resulting from government action seem to make unforeseeability a prerequisite for recovery. See Truetried Service Co. v. Hager (1997), 118 Ohio App.3d 78, 691 N.E.2d 1112; Bank One, Marion v. Marion, Ohio, Internal Medicine, Inc. (March 31, 1997), Marion App. No. 9-96-69, unreported, 1997 Ohio App. LEXIS 1601. However, the case of Glickman v. Coakley (1984), 22 Ohio App.3d 49, 488 N.E.2d 906 cites the Restatement of the Law 2d, Contracts (1981) § 264, which does not make unforeseeability a necessary prerequisite for excuse. See also Transatlantic Financing Corp v. United States (D.C. Cir. 1966), 363 F.2d 312. In addition, the Uniform Commercial Code does not require that an event be unforeseeable in

order to give rise to an excuse. See R.C. § 1302.73 (UCC § 2-615) and Official Comments thereto. Although foreseeability is clearly a very important factor in determining whether the non-occurrence of the government action was a basic assumption of the contract, the Committee believes that the Ohio Supreme Court would rely upon the Restatement of the Law 2d, Contracts (1981), and the Uniform Commercial Code and would not make unforeseeability a specific prerequisite for excuse.

CV 501.21 Affirmative defense: prevention of performance

1. GENERAL. OJI-CV 303.03 § 4.

2. PREVENTION OF PERFORMANCE. The defendant claims that he/she/it is excused from his/her/its failure to perform under the contract because the defendant prevented him/her/it from (performing his/her/its promise) ([fulfilling] [completing] a condition that would have excused the defendant from performing). If all the requirements of prevention of performance are proved, then the defendant is excused from performing the contract. "Prevention of performance" occurs when

(A) the plaintiff prevented the defendant from (performing his/her/its promise(s) under the contract) ([fulfilling] [completing] *describe condition*); and

(B) the defendant would have (performed the contract) ([fulfilled] [completed] *describe condition*) but for the plaintiff's action(s).

COMMENT

Werner v. Biederman (1940), 64 Ohio App. 423, 18 O.O.186, 28 N.E.2d 957. The defendant is not relieved from liability if his conduct justified the prevention, or if under the terms of the contract, the defendant assumed the risk of the prevention. In most cases, these will be issues of law for the trial judge. However, if the result turns on the interpretation of a contract that contains ambiguous language, an appropriate instruction can be crafted using OJI-CV 501.07.

CV 501.23 Affirmative defense: payment (satisfaction)

1. GENERAL. OJI-CV 303.03 § 4.

2. PAYMENT (SATISFACTION). The defendant claims that the plaintiff has no right to recover because the defendant has (paid) (given) (provided) the plaintiff all that was due under the contract. If (payment) (satisfaction) is proved, then the plaintiff is not entitled to recover. ("Payment") ("Satisfaction") occurs when the defendant has fully performed according to the contract.

COMMENT

Although Ohio courts describe the defense as "payment," the defense includes the performance of other obligations as well. While the plaintiff has the burden of proof of establishing a breach by the defendant, under Civ. R. 8(C) and Ohio case law, payment is an affirmative defense that must be pleaded and proved by the defendant. Zimmerman v. Eagle Mortgage Co. (1996), 110 Ohio App.3d 762, 675 N.E.2d 480; Blackwell v. International Union, UAW Local No. 1250 (1984), 21 Ohio App.3d 110, 487 N.E.2d 334; In re Estate of Buckingham (1967), 9 Ohio App.2d 305, 224 N.E.2d 383; Ertel v. Hollingsworth (November 19, 1984), Preble App. No. CA-84-03-012, unreported, 1984 Ohio App. LEXIS 11546.

CV 501.25 Affirmative defense: accord and satisfaction *[Rev. 2-24-07]*

1. GENERAL. OJI-CV 303.03 § 4.

2. ACCORD AND SATISFACTION. (*Insert name of defendant*) claims that there has been an accord and satisfaction and therefore he/she/it is not responsible for the amount claimed by (*insert name of plaintiff*). If you find by the greater weight of the evidence that the parties entered into an accord and satisfaction, you will find for (*insert name of defendant*).

3. ACCORD AND SATISFACTION DEFINED. An "accord" occurs when there is a contract between two parties in which one party agrees to accept a substitute performance other than that which is due under a contract in satisfaction of the performance required under the contract. "Satisfaction" takes place when the substitute performance is accepted.

COMMENT

Drawn from *AFC Interiors v. DiCello, D.B.A. Ohio State Home Svcs.* (1989), 46 Ohio St.3d 1.

4. ELEMENTS. To find an accord and satisfaction, you must find by the greater weight of the evidence that

(*Use appropriate alternative*)

(A)(1) the parties agreed to a contract of accord in which (*insert name of plaintiff*) agreed to accept a performance from (*insert name of defendant*) that was not required under an existing contract in substitution for a performance required under the existing contract.

(*or*)

(A)(2) (*insert name of plaintiff*) agreed to accept a sum in satisfaction of a bona fide

dispute over an amount that *(insert name of plaintiff)* claims was owed by *(insert name of defendant)*.

(and)

(B) the (substitute performance) (sum) was accepted by the *(insert name of plaintiff)*.

COMMENT

Drawn from *Allen v. R.G. Industrial Supply*, 66 Ohio St.3d 229, 1993-Ohio-43.

For instructions on contract formation generally, see OJI-CV 501.03 § 2.

Two alternatives are offered because a contract of accord, like all contracts, requires consideration in order to be enforceable. This consideration may be in the form of a performance not required under the original contract. However, consideration is not present when a creditor agrees to accept a lesser sum in satisfaction of a greater sum that is due, unless the amount due is subject to a *bona fide* dispute. The great majority of accord and satisfaction cases arise upon the payment of a lesser sum by a debtor than the sum the creditor asserts is due. When there is a *bona fide* dispute, the creditor's acceptance of the lesser sum is consideration for the accord.

5. AGREEMENT—PAYMENT BY CHECK (ADDITIONAL). In order to find a contract of accord by acceptance of a check, you must find by the greater weight of the evidence that *(insert name of plaintiff)* had reasonable notice that the check was intended to be in full satisfaction of *(insert name of defendant)*'s obligations under the existing contract. Where a check is offered as an accord, the fact that the creditor writes "accepted under protest," "with reservations of rights," or similar language does not prevent the check from acting as an accord so long as the debtor has provided notice that the check is offered as an accord.

COMMENT

Drawn from *Allen v. R.G. Industrial Supply*, 66 Ohio St.3d 229, 1993-Ohio-43.

The majority of accord and satisfaction cases involve payment by check that is asserted to be offered in full satisfaction of an existing obligation. The Supreme Court has specifically noted that a creditor must have reasonable notice that a check is offered as an accord.

See R.C. 1301.13 (B) overturning the result in *AFC Interiors v. DiCello, DBA Ohio State Home Svcs.*, (1989) 46 Ohio St.3d 1.

6. BONA FIDE DISPUTE (ADDITIONAL). In order for there to be a bona fide dispute, there must be an honest and good faith disagreement over the amount owed by *(insert name of defendant)* to *(insert name of plaintiff)* under an existing contract.

COMMENT

Drawn from *Allen v. R.G. Industrial Supply*, 66 Ohio St.3d 229, 1993-Ohio-43.

CV 501.27 Affirmative defense: waiver *[Rev. 1/20/18]*

COMMENT

The Committee believes that the appropriate burden of proof for waiver is a preponderance of the evidence. *White Co. v. Canton Transp. Co.*, 131 Ohio St. 190 (1936). The *White* case states that a waiver must be proved by a preponderance of the evidence, but the party asserting the waiver must show a clear, unequivocal, and decisive act. *But see, e.g., Seneca Valley, Inc. v. Village of Caldwell*, 156 Ohio App.3d 628, 2004-Ohio-1730 (7th Dist.) (requiring clear and convincing evidence for a waiver).

1. GENERAL. OJI-CV 303.03 § 4.

2. WAIVER. The (plaintiff) (defendant) claims that the (plaintiff) (defendant) waived the ([plaintiff's] [defendant's]) obligation to (*describe contractual obligation*) (the condition that [*describe condition*]). A waiver is the voluntary relinquishment of a known right. If all the requirements of waiver are proved, then the party claiming waiver is (relieved of his/her/its *describe contractual obligation*) (excused from *describe condition*). "Waiver" occurs when

(A) the (plaintiff) (defendant) voluntarily relinquished his/her/its right to (*describe other party's obligation*) (*describe condition*) by (*describe facts asserted to constitute a waiver*); and

(B) the (plaintiff) (defendant) was aware of the (right to *describe other party's obligation*) (condition) at the time of the waiver; and

(C) the (plaintiff) (defendant) intended to waive the (right to *describe other party's obligation*) (condition) at the time of the waiver; and

(D) the (plaintiff) (defendant) had full knowledge of the relevant facts at the time of the waiver; and

(E) the (plaintiff) (defendant) reasonably changed his/her/its position in a substantial way in reliance upon the waiver; and

COMMENT

This element is only necessary if the waiver is not supported by consideration. See *Marfield v. The Cincinnati, D. & T. Traction Co.*, 111 Ohio St. 139 (1924).

(F) the waiver was the result of a clear, unequivocal, and decisive act by the (plaintiff) (defendant).

COMMENT

The issue of waiver is a question of fact for the jury so long as there is evidence from which a waiver may legally be found. *State Automobile Mutual Ins. Assn. v. Lind*, 122 Ohio St. 500 (1930).

Mere silence will not amount to a waiver where one is not bound to speak. Where silence is, under the circumstances, susceptible of more than one interpretation, a waiver will not be inferred therefrom. *Allenbaugh v. City of Canton*, 137 Ohio St. 128 (1940).

CV 501.29 Affirmative defense: duress *[Rev. 4/28/18]*

COMMENT

Duress can constitute either physical compulsion or economic duress. In *Blodgett v. Blodgett*, 49 Ohio St.3d 243 (1990), the Supreme Court of Ohio adopted the formulation for economic duress expressed in the 1 Restatement of the Law 2d, Contracts, Section 176, Comment a (1981). According to *Blodgett,* there are three elements to establish economic duress: (1) a wrongful/improper threat; (2) communicated by the other party to the contract; (3) that leaves the victim of the duress no reasonable alternative. *See Atlantic Veneer Corp. v. Robbins,* 4th Dist. Pike No. 03CA719, 2004-Ohio-3710. The law of economic duress is a combination of law and fact—the issue of whether a threat is wrongful or improper is a question of law for the court, whereas the other two elements are questions of fact.

Merely taking advantage of another's financial difficulty is not economic duress. Instead, the person alleging financial difficulty must prove that it was contributed to or caused by the one accused of coercion. *Blodgett*, 49 Ohio St.3d 243.

According to the 1 Restatement of the Law 2d, Contracts, Section 176, a threat is improper if (1) what is threatened is a crime or a tort; (2) what is threatened is criminal prosecution; (3) what is threatened is the use of civil process and the threat is made in bad faith; or (4) the threat is a breach of the duty of good faith and fair dealing. If the exchange resulting from the contract is not on fair terms, a threat is also improper if (1) the threatened act would harm the recipient and would not significantly benefit the party making the threat; (2) the effectiveness of the threat is significantly increased by prior unfair dealing; or (3) the threat is the use of power for illegitimate ends. *See First Nat'l Bank of Shelby v. Stump*, 3rd Dist. Crawford No. 3-95-22 (Feb. 14, 1996) (applying Restatement section 176 to determine if threat was improper). There is generally no improper threat if a party is legally entitled to take the threatened action. *Maust v. Bank One Columbus, N.A.*, 83 Ohio App.3d 103 (1992); *Patton v. Wood Cty Humane Soc.*, 154 Ohio App.3d

670, 2003-Ohio-5200 (6th Dist.).

1. GENERAL. The defendant claims that he/she/it is excused from performing the contract because he/she/it entered into the contract under duress.

(*Use appropriate alternative*)

(A) PHYSICAL DURESS. Before you can find the defendant is excused from performing the contract, the defendant must prove by clear and convincing evidence that he/she/it was physically compelled to enter into the contract.

COMMENT

A contract entered into as a result of physical compulsion is void rather than voidable. It is immaterial that the duress is exercised by a party to the transaction or by a third person. *See* 1 Restatement of the Law 2d, Contracts, Section 174 and Section 175, Comment d (1981).

(or)

(B) ECONOMIC DURESS. Before you can find the defendant is excused from performing the contract, the defendant must prove by clear and convincing evidence that

(1) the defendant involuntarily accepted the terms of the plaintiff; and

(2) the circumstances permitted no other reasonable alternative; and

(3) the circumstances were a (proximate) (direct) result of the coercive acts of the plaintiff.

To avoid a contract on the basis of economic duress, the defendant must prove coercion by the plaintiff. It is not enough to show that the defendant assented merely because of difficult circumstances that are not the fault of the plaintiff.

COMMENT

To be a proximate cause, the duress must substantially contribute to the defendant's decision to enter into the contract. *Blodgett v. Blodgett*, 49 Ohio St.3d 243 (1990); *Lakeside Ave. L.P. v. Cuyahoga Cty. Bd. of Revision*, 75 Ohio St.3d 540 (1998). 1 Restatement of the Law 2d, Contracts, Section 174 and Section 175, Comment c (1981).

2. NO REASONABLE ALTERNATIVE (ADDITIONAL). In deciding whether any reasonable alternative existed, you must take into account the practicality of the available alternative(s), including a legal remedy. The defendant cannot claim a

defense of duress if he/she/it failed to take advantage of a reasonable alternative.

COMMENT

See 1 Restatement of the Law 2d, Contracts, Section 175, Comment b (1981).

This subsection will only be used with Economic Duress.

3. CLEAR AND CONVINCING EVIDENCE. OJI-CV 303.07.

COMMENT

Lucarell v. Nationwide Mut. Ins. Co., 152 Ohio St.3d 453, 2018-Ohio-15.

(Text continued on page 481)

CV 501.31 Promissory estoppel *[Rev. 2-21-09]*

COMMENT

Ohio courts have adopted § 90 of the Restatement 2d, of Contracts. *Ed Schory & Sons, Inc. v. Soc. Nat'l Bank* (1997), 75 Ohio St.3d 433; *McCroskey v. State* (1983), 8 Ohio St.3d 29. There are four elements of promissory estoppel required by Restatement § 90: (1) whether a promise was made; (2) whether reliance upon the promise occurred; (3) whether the reliance was reasonable; and (4) whether injustice can be avoided only by enforcement of the promise. The first three elements are questions of fact for the jury. See *Wallace v. Gray Drug, Inc.* (August 23, 1990), Cuyahoga App. No. 57031, unreported, 1990 Ohio App. LEXIS 3670; *Stahl v. Wellman, Inc.* (March 7, 1997), Ottawa App. No. OT-96-049, unreported, 1997 Ohio App. LEXIS 754, unreported. Whether injustice can be avoided only by enforcement of the promise is an issue of law for the judge. See *Hoffman v. Red Owl Stores* (1965), 26 Wisc.2d 683.

Three Ohio Court of Appeals cases require a clear and convincing standard to prove promissory estoppel. *Circuit Solutions, Inc. v. Mueller Elec. Co.,* 2006 Ohio 4321 (9th Dist.); *In re Estate of Popov,* 2003 Ohio 4556 (4th Dist.); *Hayes v. Brown,* 1990 Ohio App. LEXIS 5272 (3rd Dist.). These cases rely on *Kroll v. Close, Administrator,* 82 Ohio St. 190 (1910). However, in *Kroll*, the issue of the standard of proof was not discussed or considered in detail by the Court and the case did not deal with promissory estoppel; it dealt with estoppel in pais, an entirely different doctrine.

The majority of Ohio courts appear to require a preponderance of the evidence standard to prove promissory estoppel. In a number of cases they have done so explicitly. See, e.g., *Miller v. BancOhio Nat'l Bank*, 1991 Ohio App. LEXIS 2051 (10th Dist.); *McCarthy, Lebit, Crystal & Haiman, LPA v. First Union*, 87 Ohio App.3d 613 (8th Dist.); *Evets Electric v. Ohio Edison Co.,* 1991 Ohio App. LEXIS 6223 (11th Dist.). In many more cases, Ohio courts discuss the requirements of promissory estoppel in detail without indicating that a heightened standard of proof applies. The Committee believes a preponderance of the evidence is the appropriate standard.

1. PLAINTIFF'S CLAIM. The plaintiff claims that the defendant is (prevented) (estopped) from denying a contract based upon promissory estoppel.

2. PROOF OF CLAIM. In order to find promissory estoppel, you must find by the greater weight of the evidence that

(A) the defendant promised to the plaintiff that (*describe alleged promise*); and

(B) the defendant should reasonably have expected the plaintiff to rely on the promise by (*describe action or forbearance asserted by the plaintiff*); and

(C) the plaintiff (*describe action or forbearance*) in reliance upon the promise.

COMMENT

See *Ed Schory & Sons, Inc. v. Society Nat. Bank* (1996), 75 Ohio St.3d 433; *McCroskey v. State* (1983), 8 Ohio St.3d 29; *Talley v. Teamsters Local No. 377* (1976), 48 Ohio St. 2d 142. A number of appellate decisions have rephrased section (B) above to require that the reliance of the plaintiff be reasonable and foreseeable. See, e.g., *Weiper v. W.A. Hill & Assoc.* (1995), 104 Ohio App.3d 250; *Healey v. Republic Powdered Metals, Inc.* (1992), 85 Ohio App.3d 281; *O.E. Meyer Co. v. The BOC Group, Inc.* (March 3, 2000), Erie App. No. E-99-002, unreported, 2000 Ohio App. LEXIS 734. The Ohio Supreme Court, however, has explicitly adopted the Restatement 2d, Contracts § 90, which uses the language in the instruction.

CV 501.33 Expectation damages *[Rev. 3-28-09]*

COMMENT

In cases involving the sale of goods, see OJI-CV 505.25 to OJI-CV 505.53 for instructions on buyer's and seller's remedies.

This section deals with the "expectation" measure of damages. It is the usual measure of damages for breach of contract and seeks to put the injured party in the same position as if the breaching party had performed the contract. Generally, courts have not permitted a party to recover damages for emotional distress suffered as a result of a breach of contract. However, in *Kishmarton v. William Bailey Constr. Co.*, 93 Ohio St.3d 226, 2001-Ohio-1334, the Court adopted Restatement of the Law 2d, Contracts (1981) § 353 and held that when a vendee's claim for breach of an implied duty to construct a house in a workmanlike manner is successful, emotional distress damages can be recovered where the breach causes bodily harm or the breach is of such a kind that serious emotional distress is a particularly likely result. For a definition of "serious emotional distress," see OJI-CV 429.07 § 3.

When a breach of contract results in physical damage to real property or when, as a result of a breach, real property must be repaired, restored, or completed in order to conform to a contract, the fundamental principle of paragraph 1 of this instruction that damages should put the plaintiff in the same position as performance remains applicable. If the property is commercial in nature, the difference in market value between what the plaintiff was promised and what the plaintiff received will set the upper limit on damages. See *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238. When the property is noncommercial real estate, a plaintiff may be awarded the cost of repair, restoration, or completion even if it exceeds the diminution in market value, so long as the cost does not result in excessive compensation and is reasonable under the circumstances. *Martin v. Design Constr. Servs.*, 2009-Ohio-1. Evidence of the diminution of the fair market value of the property caused by the

damage may be considered in deciding the reasonableness of the cost of repairs. When evidence of market value is introduced, the court may need to draft appropriate additional instructions. See OJI-CV 315.35 § 3 for the definition of "fair market value."

An injured party, however, may elect to recover damages measured by his/her reliance interest, which seeks to put the injured party in the same position that he/she would have been in had the contract not been made. Also, the reliance interest may be protected by the court as an alternative measure of damages in other instances such as where the contract is formed by promissory estoppel or where expectation damages are unforeseeable or too speculative. See Restatement of the Law 2d, Contracts (1981) § 90. For an instruction on the reliance interest, see OJI-CV 501.31.

In addition, a plaintiff has the right to disregard the contract and sue in restitution. *Cleveland Co. v. Standard Amusement Co.* (1921), 103 Ohio St. 382. Often called "quantum meruit" or "unjust enrichment," this measure is determined by the reasonable value of the benefit that the injured party has conveyed on the contract breacher. For an instruction on restitution damages, see OJI-CV 501.37. Restitution may be recovered even in the absence of an enforceable contract if the necessary requirements are met. See OJI-CV 501.39.

1. GENERAL. If you find by the greater weight of the evidence that the defendant (breached) (broke) the contract (and was not excused because [*describe excuse asserted by the defendant*]), the plaintiff is entitled to damages in the amount sufficient to place him/her in the same position in which he/she would have been if the contract had been fully performed by the defendant to the extent that the damages are reasonably certain and reasonably foreseeable.

2. DAMAGES – LOST PROFITS. Lost profits are calculated by deciding what the plaintiff was entitled to receive had the contract been performed. You should then add other damages, if any, suffered by the plaintiff as a result of the breach by the defendant. From this sum you should subtract the amount, if any, that the plaintiff saved by not having to fully perform the contract.

COMMENT

See *Allen, Heaton & McDonald, Inc. v. Castle Farm Amusement Co.* (1949), 151 Ohio St. 522. This instruction may be used to instruct the jury on the calculation of the expectation interest where the plaintiff is seeking recovery of lost profits.

3. REASONABLY CERTAIN. You may only award damages the existence and amount of which are reasonably certain and have been proved to you by the greater weight of the evidence. You may not award damages that are remote or speculative.

COMMENT

Drawn from *AGF, Inc. v. Great Lakes Heat Treating Co.* (1990), 51 Ohio St.3d 177. The AGF case held that a "new" business is not prevented from recovering lost profits if they are established with reasonable certainty. The Court said that "reasonable certainty" may be established through the use of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and any other relevant facts.

The trial judge must make an initial determination as to whether the plaintiff's evidence, if believed by the jury, would be sufficient to establish damages with reasonable certainty.

4. REASONABLY FORESEEABLE/CONTEMPLATION OF THE PARTIES. You may only award those damages that were the natural and probable result of the breach of the contract or that were reasonably within the contemplation of the parties as the probable result of the (breach) (breaking) of the contract. This does not require that the defendant actually be aware of the damages that will result from the breach of contract so long as the damages were reasonably foreseeable at the time the parties entered into the contract as a probable result of the breach.

COMMENT

Midvale Coal Co. v. Cardox Corp. (1949), 152 Ohio St. 437; *Wyler Ackerland & Co. v. The Louisville & Nashville Railroad Co.* (1911), 83 Ohio St. 293; *Devereux v. Buckley & Co.* (1877), 34 Ohio St. 16; *Milhoan v. DallePeeze* (Feb. 15, 1994), Franklin App. No. 93-AP-376; *Hadley v. Baxendale* (1854), 9 Exch. 341, 156 Eng. Rep. 145. Occasionally Ohio cases have stated the rule in a way that suggests that the parties must at the time of the contract have been actually aware of the damages that would result from the breach. See *Ed Stinn Chevrolet, Inc. v. National City Bank* (1986), 28 Ohio St.3d 221. However, the rule originated in the English case of *Hadley v. Baxendale*, which does not require actual awareness of the damages that would result from the breach so long as the damages are reasonably foreseeable in light of the knowledge of the parties at the time of the contract. Despite the language of these cases, Ohio courts have explicitly followed *Hadley* since 1877 and have applied the rule consistent with *Hadley*. See Restatement of the Law 2d, Contracts (1981) § 351.

5. CONTEMPLATION OF THE PARTIES — LOST PROFITS. In order to award lost profits claimed by the plaintiff, you must find that profits were within the contemplation of the parties at the time the contract was made and that the loss of profits was the probable result of the (breach) (breaking) of the contract.

(Text continued on page 485)

COMMENT

In cases dealing with lost profits, the Ohio Supreme Court has restated the general rule found in § 4 in the specific manner stated in this § 5. See *AGF, Inc. v. Great Lakes Heat Treating Co.* (1990), 51 Ohio St.3d 177; *Gahanna v. Eastgate Properties, Inc.* (1988), 36 Ohio St.3d 65; *Charles R. Combs Trucking, Inc. v. International Harvester, Inc.* (1984), 12 Ohio St.3d 241.

6. DUTY TO MITIGATE. The defendant claims the plaintiff failed to mitigate his/her damages. If the defendant proves by the greater weight of the evidence that the plaintiff did not (use reasonable diligence) (make reasonable efforts) under the facts and circumstances in evidence to (avoid loss) (lessen damages) caused by the defendant's breach of contract, you should not allow damages that could have been avoided by (the exercise of reasonable diligence) (reasonable efforts to avoid loss). The plaintiff, however, is not required to take measures that would involve undue risk, burden, or humiliation.

COMMENT

F. Enterprises, Inc. v. Kentucky Fried Chicken Corp. (1976), 47 Ohio St.2d 154; *Czarnecki v. Basta* (1996), 112 Ohio App.3d 418; *Chandler v. General Motors Acceptance Corp.* (1980), 68 Ohio App.2d 30.

7. NOMINAL DAMAGES. If you find that the defendant has (breached) (broken) the contract with the plaintiff, and if you further find that the plaintiff has failed to prove any damages calculated according to these instructions, you may award the plaintiff nominal damages. "Nominal" means trifling or small. Nominal damages are generally $10 or less.

COMMENT

Drawn from *Lacey v. Laird* (1956), 166 Ohio St. 12; *Stojkovic v. Avery & Thress, M.D., Inc.* (May 28, 1999), Hamilton App. No. C-970279.

CV 501.35 Reliance damages

If you find by the greater weight of the evidence that the defendant (broke) (breached) the contract (and was not excused because [*describe excuse asserted by defendant*]), the plaintiff is entitled to recover the amount of damages necessary to place him/her in the same position as if the contract had not been made. These damages include expenditures made in preparation for performance or in performance of the contract.

COMMENT

See Restatement of the Law 2d, Contracts (1981) §§ 344, 349.

CV 501.37 Rescission and restitution

1. GENERAL. If you find by the greater weight of the evidence that the defendant (broke) (breached) the contract (and was not excused because [*describe excuse asserted by defendant*]), the plaintiff is entitled to recover the reasonable value of the (performance) (work) (services) (materials) furnished by the plaintiff to the defendant. This value is not limited by the contract price and may be greater or less than the contract price.

2. LOSS BY FULL PERFORMANCE. The defendant claims that the plaintiff would have lost more money by full performance of the contract than he/she lost by the defendant's (breach) (breaking) of the contract. If you find by the greater weight of the evidence that the plaintiff would have lost more money by full performance of the contract than he/she lost by the defendant's (breach) (breaking) of the contract, you shall award the plaintiff no damages.

COMMENT

It has long been true in Ohio that a plaintiff injured by a breach of contract has the option to "rescind" the contract and recover in restitution or "quantum meruit." Cleveland Co. v. Standard Amusement Co. (1921), 103 Ohio St. 382, 133 N.E. 615; Wellston Coal Co. v. Franklin Paper Co. (1897), 57 Ohio St. 182, 48 N.E. 888. This instruction should only be used when the plaintiff has chosen to exercise that option.

If the plaintiff chooses to rescind the contract and sue in restitution, the contract price, which the plaintiff would have received upon full performance, is irrelevant to the amount the plaintiff can recover in restitution. However, if the defendant can prove that the plaintiff would have lost more by performing the contract than he/she lost as a result of the defendant's breach, the plaintiff will not be permitted to recover in restitution. Wellston Coal Co. v. Franklin Paper Co. (1897), 57 Ohio St. 182, 48 N.E. 888.

CV 501.39 Quantum meruit: mistake/implied in fact contract

COMMENT

In order to recover for unjust enrichment in Ohio, three elements must be proved: (1) there must have been a benefit conferred upon the defendant by the plaintiff; (2) the benefit must have been given with the knowledge of the

defendant; and (3) retention of the benefit by the defendant would be unjust under the circumstances. *R.J. Wildner Contracting Co., Inc. v. Ohio Turnpike Comm'n* (N.D. Ohio 1996), 913 F. Supp. 1031.

Whether retention of the benefit by the defendant would be unjust under the circumstances is a question of law. Before this instruction is given, the judge must insure that the plaintiff's evidence, if believed, satisfies this element. Ohio courts have applied a relatively high standard for restitution in the absence of an enforceable contract.

Restitution is available in a wide variety of circumstances. This instruction is limited to those occasions where a benefit has been conferred on the defendant by mistake, or where the plaintiff is arguing that the parties have entered into an implied-in-fact contract. See Restatement of the Law, Restitution (1937) § 40.

1. GENERAL. Plaintiff claims that he/she is entitled to recover the reasonable value of the (services he/she performed) (work, labor and materials he/she provided) for the benefit of the defendant. Plaintiff may recover the reasonable value of (these services) (this work, labor, and materials) if you find by the greater weight of the evidence that

(A) the plaintiff (performed services) (furnished work, labor, and materials) for the defendant's benefit and with the defendant's knowledge; and

(B) the defendant knew or should have known that the (services) (work, labor, and materials) were given with the expectation of payment of reasonable value; and

(C) the defendant had a reasonable opportunity to prevent the plaintiff from giving (services) (work, labor, and materials) prior to them being rendered by the plaintiff.

(Text continued on page 487)

(Rcl.09S2CIV–9/2009 Pub.4346)

Thress, M.D., Inc. (May 28, 1999), Hamilton App. No. C-970279.

CV 501.35 Reliance damages

If you find by the greater weight of the evidence that the defendant (broke) (breached) the contract (and was not excused because [*describe excuse asserted by defendant*]), the plaintiff is entitled to recover the amount of damages necessary to place him/her in the same position as if the contract had not been made. These damages include expenditures made in preparation for performance or in performance of the contract.

COMMENT

See Restatement of the Law 2d, Contracts (1981) §§ 344, 349.

CV 501.37 Rescission and restitution

1. GENERAL. If you find by the greater weight of the evidence that the defendant (broke) (breached) the contract (and was not excused because [*describe excuse asserted by defendant*]), the plaintiff is entitled to recover the reasonable value of the (performance) (work) (services) (materials) furnished by the plaintiff to the defendant. This value is not limited by the contract price and may be greater or less than the contract price.

2. LOSS BY FULL PERFORMANCE. The defendant claims that the plaintiff would have lost more money by full performance of the contract than he/she lost by the defendant's (breach) (breaking) of the contract. If you find by the greater weight of the evidence that the plaintiff would have lost more money by full performance of the contract than he/she lost by the defendant's (breach) (breaking) of the contract, you shall award the plaintiff no damages.

COMMENT

It has long been true in Ohio that a plaintiff injured by a breach of contract has the option to "rescind" the contract and recover in restitution or "quantum meruit." Cleveland Co. v. Standard Amusement Co. (1921), 103 Ohio St. 382, 133 N.E. 615; Wellston Coal Co. v. Franklin Paper Co. (1897), 57 Ohio St. 182, 48 N.E. 888. This instruction should only be used when the plaintiff has chosen to exercise that option.

If the plaintiff chooses to rescind the contract and sue in restitution, the contract price, which the plaintiff would have received upon full performance, is irrelevant to the amount the plaintiff can recover in restitution. However, if the defendant can prove that the plaintiff would have lost more by performing the contract than he/she lost as a result of the defendant's breach, the plaintiff will not be permitted to recover in restitution. Wellston Coal Co. v. Franklin Paper

Co. (1897), 57 Ohio St. 182, 48 N.E. 888.

CV 501.39 Quantum meruit: mistake/implied in fact contract

COMMENT

In order to recover for unjust enrichment in Ohio, three elements must be proved: (1) there must have been a benefit conferred upon the defendant by the plaintiff; (2) the benefit must have been given with the knowledge of the defendant; and (3) retention of the benefit by the defendant would be unjust under the circumstances. *R.J. Wildner Contracting Co., Inc. v. Ohio Turnpike Comm'n* (N.D. Ohio 1996), 913 F. Supp. 1031.

Whether retention of the benefit by the defendant would be unjust under the circumstances is a question of law. Before this instruction is given, the judge must insure that the plaintiff's evidence, if believed, satisfies this element. Ohio courts have applied a relatively high standard for restitution in the absence of an enforceable contract.

Restitution is available in a wide variety of circumstances. This instruction is limited to those occasions where a benefit has been conferred on the defendant by mistake, or where the plaintiff is arguing that the parties have entered into an implied-in-fact contract. See Restatement of the Law, Restitution (1937) § 40.

1. GENERAL. Plaintiff claims that he/she is entitled to recover the reasonable value of the (services he/she performed) (work, labor and materials he/she provided) for the benefit of the defendant. Plaintiff may recover the reasonable value of (these services) (this work, labor, and materials) if you find by the greater weight of the evidence that

(A) the plaintiff (performed services) (furnished work, labor, and materials) for the defendant's benefit and with the defendant's knowledge; and

(B) the defendant knew or should have known that the (services) (work, labor, and materials) were given with the expectation of payment of reasonable value; and

(C) the defendant had a reasonable opportunity to prevent the plaintiff from giving (services) (work, labor, and materials) prior to them being rendered by the plaintiff.

Chapter CV 505

UNIFORM COMMERCIAL CODE [SALES]

I. FORMATION OF THE CONTRACT

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CV 505.03 Contract formed by conduct of the parties

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V. BUYER'S REMEDIES

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acceptance
CV 505.45 Buyer's damages for breach of warranty of accepted goods
CV 505.47 Buyer's notice of breach; accepted goods
CV 505.49 Buyer's "cover" damages
CV 505.51 Buyer's incidental and consequential damages
CV 505.53 Limitation of buyer's remedies

INTRODUCTORY COMMENT

These instructions assume that the trial judge has already explained the claims of the parties, defined the burden of proof as "the greater weight of the evidence," and allocated that burden appropriately.

I. FORMATION OF THE CONTRACT

COMMENT

The general principles of contract law apply to contracts under the UCC, unless displaced by the UCC. R.C. 1301.03 [UCC § 1-103]. There still must be a bargain supported by consideration or a substitute therefor. In many ways, however, contracts are easier to form under the UCC than under traditional contract doctrines. For example: the Statute of Frauds requires only that, for contracts for a price of $500 or more, there be a writing sufficient to "indicate" that a contract was made, R.C. 1302.04 [UCC § 2-201]; contracts may be formed by the conduct of the parties even if the moment of formation cannot be determined, R.C. 1302.07 [UCC § 2-204]; offers may be made irrevocable without consideration under the terms of R.C. 1302.08 [UCC § 2-205]; forms exchanged by the parties need not mirror each other, R.C. 1302.10 [UCC § 2-207]; and some terms may be left open to be supplied by UCC sections, R.C. 1302.07 [UCC § 2-204]. This list is not inclusive of all possible examples.

CV 505.01 Contract formation R.C. 1302.07

COMMENT

The trial judge must first determine whether there is a reasonable basis for an appropriate remedy. If no such basis exists, the contract must fail for indefiniteness as a matter of law. R.C. 1302.07 [UCC § 2-204].

1. GENERAL. The (buyer) (seller) claims that the (seller) (buyer) breached a

(Text continued on page 489)

contract for the sale of (*describe goods*). The (seller) (buyer) denies that the parties entered into a contract. Before the (buyer) (seller) can recover in this case, the (buyer) (seller) must prove that the parties entered into a contract.

2. FORMATION. In order to find that a contract was formed, you must decide that the parties, by (their words) (their conduct) (a combination of their words and conduct), indicated an intention to enter into an agreement binding on both of them. A contract may be made in any manner which shows the parties agreed to a sale of (*describe goods*).

3. OMITTED TERMS. You may find that a contract was formed between the parties even though they failed to include some terms in their agreement or left them to be agreed upon later. You may consider such omissions as evidence of whether the parties intended to form a contract.

COMMENT

For further instructions relating to express and implied contracts see OJI-CV 501.03 § 3.

The UCC contains a number of sections which, *if a contract was formed*, supply terms which the parties omitted. Among these are R.C. 1302.22 [UCC § 2-309] (time for delivery or shipment), R.C. 1302.23 [UCC § 2-310] (when buyer's payment is due), R.C. 1302.55 [UCC § 2-511] (buyer's payment obligation), R.C. 1302.48 [UCC § 2-504] (seller's tender obligations), and R.C. 1302.18 [UCC § 2-305] (price not determined). This list is not inclusive of all "gap fillers."

CV 505.03 Contract formed by conduct of the parties R.C. 1302.07

1. GENERAL. You may find that a contract was formed as a result of the conduct of both parties which recognized the existence of a contract (even though the writings of the parties do not create a contract). The parties have recognized the existence of a contract if their conduct would indicate to a reasonable person in their position that they intended to be bound to a contract. In deciding whether the conduct of the parties formed a contract, you must consider all of the facts and circumstances in evidence, including any usages of trade in which the parties are engaged.

2. USAGE OF TRADE. R.C. 1301.11(B) [UCC § 1-205(2)].

CV 505.05 Open price term R.C. 1302.18

COMMENT

Article 2 of the UCC recognizes that the buyer and seller, if they indicate an intent to do so, can enter into a contract even though they have not agreed on the price of the goods. R.C. 1302.18 [UCC § 2-305]. This section is applicable only if there is a factual determination that the parties indicated an intent to

make a contract. If that determination is made, the missing price term is "a reasonable price at the time for delivery," a jury question. R.C. 1302.18(A) [UCC § 2-305]. "Reasonable price" is not necessarily the same as "fair market value." 1 White and Summers, Uniform Commercial Code (Pract. Ed. 3 Ed.1988), 155-162, Sections 3-7.

1. GENERAL. The (buyer) (seller) claims, and the (seller) (buyer) denies, that they entered into a contract for the sale and purchase of (*describe the goods*). The parties agree that the claimed contract is silent as to the price to be paid.

COMMENT

If the parties do not agree that the claimed contract is silent as to the price to be paid, appropriate instructions should be given.

2. FORMATION. The lack of price term does not necessarily mean that there is no contract. If you decide that the parties, through (their words) (their conduct) (a combination of their words and conduct) indicated an intention to enter into an agreement binding on the parties, a contract has been formed, even though they did not agree on the price. The first issue you must decide is whether the parties indicated an intention to enter into a contract. If you find that no such intention was indicated, there was no contract.

3. PRICE. If, however, you find that such an intention was indicated, the price is "a reasonable price at the time for delivery." You must decide "a reasonable price at the time for delivery" from the evidence, including evidence of (course of dealing) (course of performance) (usage of trade) (fair market value) (*describe other evidence*). "Reasonable price" means the price that is reasonable as to this seller and this buyer, and is not necessarily the same as "fair market value."

COMMENT

See OJI-CV 505.01 and OJI-CV 505.03 for an expanded instruction as to contract formation.

4. FAIR MARKET VALUE. OJI-CV 315.19 § 3.

5. COURSE OF DEALING. R.C. 1301.11(A) [UCC § 1-205(1)].

6. USAGE OF TRADE. R.C. 1301.11(B) [UCC § 1-205(2)].

7. COURSE OF PERFORMANCE. R.C. 1302.11 [UCC § 2-208].

CV 505.07 Additional terms in confirmation or acceptance R.C. 1302.10

COMMENT

The following instructions involve the so-called "Battle of the Forms" and are appropriate when the parties have exchanged preprinted offer and acceptance forms or preprinted confirmations of an oral agreement. R.C. 1302.10 [UCC § 2-207]. Many of the issues surrounding the battle of the forms will usually be resolved as matters of law rather than fact. (For example, does a term materially alter the contract? Is an acceptance expressly conditional on the buyer's assent? Does the offer expressly limit acceptance of the terms of the offer?) Whether a response is a definite and seasonable (timely) expression of acceptance or whether the parties, by their conduct, have recognized the existence of a contract even though the writings do not establish one will often be resolved as questions of fact. Whether a response is seasonable depends upon general contract principles relating to the offer and acceptance.

1. GENERAL. If you find that the response of (*insert name of offeree*) was a definite and timely expression of acceptance of the offer made by (*insert name of offeror*), then a contract exists between the two parties although (*offeree's*) response contained terms which were additional to or different from those in (*offeror's*) offer. In order to decide whether the response was a definite expression of acceptance, you must decide whether a reasonable person in the position of (*offeror*) would have believed that the offer had been accepted by the response of (*offeree*). In making this decision, you will consider all of the facts and circumstances in evidence, including (usages of trade) (course of dealing) (course of performance).

2. USAGE OF TRADE. R.C. 1301.11(B) [UCC § 1-205(2)].

3. COURSE OF DEALING. R.C. 1301.11(A) [UCC § 1-205(1)].

4. COURSE OF PERFORMANCE. R.C. 1302.11 [UCC § 2-208].

CV 505.09 Modification, rescission, and waiver R.C. 1302.12

COMMENT

R.C. 1302.12 [UCC § 2-209] deals with two subjects: modification or rescission of a contract, and waiver of an executory portion of a contract. The section sets out several "rules":

1. Consideration is not needed to support an agreement modifying an Article 2 contract. (No reference is made to rescission in R.C. 1302.12(B) [UCC § 2-209(2)] because the mutual release of obligations involved in a rescission is sufficient consideration.)

2. A written agreement excluding oral modification or rescission is enforceable.

3. The requirements of the UCC's Statute of Frauds must be satisfied if the contract as modified is within its provisions.

4. An attempt to modify some term or to rescind the contract can operate as a waiver even though rules 2 or 3, above, are not met.

5. Under certain circumstances a waiver may be retracted. Many of the potential problems under this UCC section involve questions of law for the court. The following three instructions address disputes that are questions for the jury.

1. FINDING AN AGREEMENT TO MODIFY. The (buyer) (seller) claims that the contract with the (seller) (buyer) was modified by a later agreement between parties. The (seller) (buyer) denies this claim. You will decide whether such an agreement was made. If you find either (a) that the (seller) (buyer) agreed to the modification, or (b) that a person in the position of the (buyer) (seller) would have reasonably believed that the (seller) (buyer) agreed to the (buyer's) (seller's) proposed modification, then you will find that such an agreement was made. In making the decision, you will consider the language used and all of the facts and circumstances in evidence.

COMMENT

This instruction recognizes that agreement may be found in subjective mutual assent (those situations in which both parties agree to the same terms) or in objective mutual assent (those situations in which one party has been led to reasonably believe there is agreement). Although the modification does not need consideration, the agreement as modified must be supported by consideration. For example, a seller (on Monday) agreed to sell a bicycle to a buyer for $100, with delivery scheduled for the next Saturday. On Thursday, the seller and buyer "modified" the agreement by providing that the buyer need not pay the $100. The modified "agreement" is a gift promise by the seller and is not enforceable on the delivery date.

R.C. 1302.12 [UCC § 2-209] does not provide that all modifications without consideration will necessarily be enforced, such as a modification obtained by duress. *Roth Steel Products v. Sharon Steel Corp.* (C.A.6, 1983), 705 F.2d 134.

R.C. 1302.12(C) [UCC § 2-209] provides that the UCC's Statute of Frauds must be met if the contract, as modified, is within its provisions. If a sales agreement for a price under $500 is modified to increase the price to $500 or more, the price modification does not need a separate consideration, but the

UCC's Statute of Frauds must be satisfied even though not originally applicable.

In those situations in which the UCC's Statute of Frauds is satisfied by a writing, that writing (if otherwise sufficient) will continue to satisfy the Statute although it may have been made prior to a modification; the quantity term, however, may not be increased beyond that stated in the writing, without a further writing. This last point is subject to the waiver language found in R.C. 1302.12(D) [UCC § 2-209].

2. CONTRACT EXCLUDING ORAL MODIFICATION. The written agreement between the parties contains a provision which excludes a (modification) (rescission) except by a signed writing. That provision is binding unless you find that the parties waived that provision by (their words) (their conduct) (a combination of their words and conduct).

COMMENT

This instruction recognizes the general enforceability of the "no oral modification" clause in contracts between merchants. In other contracts, the clause must be separately signed by the non-merchant. The clause may be waived by words or conduct after the execution of the writing.

A course of dealing prior to the execution of the writing (as, for example, parties who have entered into a number of similar contracts-all containing a "no oral modification" clause-but who have consistently ignored the clause) is admissible to interpret the "no oral modification" clause in question, but that course of dealing is not a waiver. See R.C. 1302.11 [UCC § 2-208]. A course of performance is, however, relevant to show a waiver.

R.C. 1302.12(D) [UCC § 2-209(4)] indicates that an attempt at modification or rescission that does not satisfy the "no oral modification" clause or the UCC's Statute of Frauds can operate as a waiver of the "no oral modification" clause or the Statute of Frauds. Generally, courts have required reliance upon the attempted modification before finding a waiver. See *Wisconsin Knife Works v. National Metal Crafters (C.A.7, 1986)*, 781 F.2d 1280; 1 White and Summers, Uniform Commercial Code (Pract. Ed. 3 Ed.1988), 62-63, Sections 1-6.

3. WAIVER. OJI-CV 501.27.

4. RETRACTION OF WAIVER. If you find (a) the (buyer) (seller) sent the reinstatement notice within a reasonable time before performance was required and (b) the (seller) (buyer) did not (materially) (substantially) change position in reliance on the waiver, then you must find that the waiver was withdrawn and the contract provision was reinstated. What is a reasonable time depends on all of the facts and circumstances in evidence.

COMMENT

This instruction may have to be modified to fit the facts of the case because there are many different ways in which a claimed waiver and its retraction may arise. The basic rule is that a waiver (the voluntary relinquishment of a known right) may be retracted so long as no consideration, or substitute for consideration, was given in exchange for the waiver. Reliance is a substitute for consideration.

II. WARRANTIES; CREATION AND EXCLUSION

COMMENT

See Introductory Comment to OJI-CV Chapter 505

CV 505.11 Express warranties R.C. 1302.26

1. INTRODUCTION. There are two types of warranties that may accompany a sale of goods: the first is the express warranty, arising from the agreed terms of the sale; the second is the implied warranty, arising only from the fact that a sale was made. Both may exist in the same sale. If the seller defaults under either type of warranty, the buyer has remedies which will be discussed later.

2. FORMATION OF EXPRESS WARRANTY. If you find that (a) a (promise) (affirmation of fact) was made by the (seller) (the seller's representative) and (b) the (promise) (affirmation of fact) became a part of the basis of the bargain between the parties, then the agreement contains an express warranty that the goods will conform to the (promise) (affirmation of fact).

3. PROMISE OR AFFIRMATION OF FACT. The seller has made a (promise) (affirmation of fact) if, from the facts and circumstances in evidence, you find that a reasonable person in the position of the buyer would believe that the seller had made (a promise) (affirmation of fact) about the goods.

4. BASIS OF THE BARGAIN. It is not necessary that the promise or affirmation be the motivating factor of the sale or be relied upon by the buyer; it is sufficient if the (promise) (affirmation of fact) is one of the bases of the bargain. If you find, however, that the buyer did rely on the (promise) (affirmation of fact), the (promise) (affirmation of fact) would then be part of the basis of the bargain.

COMMENT

Do not use this instruction if there is no evidence that the buyer relied on the promise or affirmation of fact. The problem is discussed in point 3 of the Comment following section 7.

5. WARRANTY VS. PUFFING. No special words are needed to create an express warranty. There is no requirement that the words "warranty" or "guaranty" be used, nor must the seller intend to create a warranty. An express warranty is created if a reasonable person in the position of the buyer would understand that the seller was making a promise as to the performance of the goods or asserting a fact about the condition of the goods. If you find, however, from all of the facts and circumstances in evidence that a reasonable person in the position of the buyer would understand that the statement was only an opinion or commendation of the goods by the seller, that statement is not an express warranty.

6. THE SELLER'S KNOWLEDGE. An express warranty has been formed by the (promise) (affirmation of fact) whether or not the seller knew the affirmation of fact was untrue or intended that the promise would be performed.

7. TIME OF MAKING THE PROMISE OR AFFIRMATION. The (promise) (affirmation of fact) need not be made before the sale is made. A (promise) (affirmation of fact) made after the sale creates an express warranty if you find that the (promise) (affirmation of fact) became a part of the basis of the bargain.

COMMENT

A promise or affirmation of fact made after the formation of a contract can become a part of the contract. For example, if the promise or affirmation caused the buyer to retain the goods or to use them in a particular way, that promise or affirmation may be a part of the contract. If such an issue is involved, the last sentence of the instruction can be modified to respond to the facts involved.

The express warranty section of the UCC has given rise to thousands of factual disputes, primarily because it is a section applicable to the facts of the transaction-what the parties did and said at the time of (and, on occasion, after) the deal-and how the law of contracts applies to these facts. The section presumes an understanding that agreements do not require subjective mutual assent, but may be based on the reasonable understanding of the party to whom the promise or the affirmation of fact was made. Most of the disputes are to be resolved by the jury. There are, however, several legal principles which courts have applied:

1. The promise or affirmation need not be in writing. Either or both may be oral, subject to the application of the UCC's parol evidence rule. R.C. 1302.05 [UCC § 2-202].

2. An express warranty may not be disclaimed; it may, however, be withdrawn

prior to the final agreement of the parties so that it does not become a part of the "basis of the bargain."

3. There is a dispute among the cases as to whether "basis of the bargain" requires reliance on the promise or the affirmation of fact. Some courts have said, often in dictum, that reliance is necessary. Other courts have said that the affirmation need only be a factor inducing the buyer to enter into the transaction. A further possibility exists, one in which the promise or affirmation played no part of the basis of the bargain-as when the buyer did not hear or read the promise or affirmation. This type of case arises most often when the seller has made statements in advertisements which were not seen by the buyer. Cases have disagreed. The majority holds that, before an express warranty has been created, the buyer must have seen the advertisement and relied thereon. Ohio has not yet reached an answer. *Rogers v. Toni Home Permanent Co.* (1958), 167 Ohio St. 244, 147 N.E.2d 612, involving strict liability in tort, stated that failure to read the advertisement is not a basis for denying recovery.

An advertisement could also be used to form the basis of implied warranties.

4. Knowledge by the buyer, at the time of the sale, that the promise or affirmation is not true will prevent the promise or affirmation from becoming a part of the basis of the bargain.

5. An affirmation or promise made after the sale may become enforceable through the doctrine of modification. No new consideration is needed. See R.C. 1302.12 [UCC § 2-209]; OJI-CV 505.09.

6. Negligence, fault, or knowledge of falsity on the part of the seller is not an element of express warranty. An affirmation made with the honest (and even reasonable), but mistaken, belief that it is true, creates an express warranty if it becomes a part of the basis of the bargain.

7. The seller need not make the statement; the statement could be made by an agent or representative of the seller.

8. Parties other than the buyer may have remedies based on breach of warranty. See R.C. 1302.31 [UCC § 2-318].

8. GOODS SOLD BY DESCRIPTION. If you find that the goods were described and that the description became a part of the basis of the bargain between the parties, the agreement contains an express warranty that the goods will conform to the description. It is not necessary that the description be the sole basis of the bargain; it is sufficient if the description is one of the bases of the bargain.

COMMENT

This section has direct application when the goods are preceded or accompanied by a blueprint, design, or specifications. The Official Comment to R.C. 1302.26 [UCC § 2-313] warns that any description must be read in the context of general trade usage. That warning applies to the entire express warranty

section. The same principles relevant to "the basis of the bargain," as discussed in the preceding Comment, apply to this provision.

9. GOODS SOLD BY SAMPLE OR MODEL. If you find that a (sample) (model) became a part of the basis of the bargain between the parties, the agreement contains an express warranty that all of the goods will conform to that (sample) (model). It is not necessary that the (sample) (model) be the sole basis of the bargain; it is sufficient if the (sample) (model) is one of the bases of the bargain.

10. SAMPLE. A "sample" is an item drawn from the bulk of the goods which are the subject of the sale.

11. MODEL. A "model" is an item offered for inspection when the goods which are the subject matter of the sale are not at hand and which has not been drawn from the bulk of the goods which are the subject matter of the sale.

CV 505.13 Implied warranty; merchantability; usage of trade R.C. 1302.27 *[Rev. 5-7-11]*

COMMENT

The Committee believes that a UCC claim for relief based upon the implied warranties of merchantability and fitness has not been eliminated by the Ohio Product Liability Act (OPLA), although state and federal case law applying the OPLA are in conflict.

The OPLA has been held to abrogate all common law product liability claims for relief, including common law claims of implied warranty. R.C. 2307.71(B). See *Miles v. Raymond Corp.* (N.D.Ohio 2009), 612 F.Supp.2d 913. The law is unclear, however, as to whether a UCC statutory implied warranty claim is preempted by the OPLA when the claim involves personal injury or property damages and therefore qualifies as a "product liability" claim under the OPLA. There are at least two Ohio cases in which the courts held that UCC claims of implied warranty that involved claims of personal injury or property damage are preempted by the OPLA. See *Nadel v. Burger King Corp.* (1997), 119 Ohio App.3d 578, overruled on other grounds by *Bouher v. Aramark Servs.*, 181 Ohio App.3d 599, 2009-Ohio-1597; *Luthman v. Minster Supply Co.*, 3d Dist. No. 2-06-43, 2008-Ohio-165. There are also a number of cases in which courts have held that the OPLA preempts claims of implied warranty but it is not clear whether the courts include both common law and statutory claims, or merely common law claims. See *Stratford v. SmithKline Beecham Corp.* (June 17, (2008), S.D.Ohio No. 2:07-cv-639; *Barrett v. Waco Int'l, Inc.* (1997), 123 Ohio App. 3d 1; *Allums v. Gillenwater* (April 25, 1996), 8th Dist. Nos. 68870, 68871. See, also, *Donley v. Pinnacle Foods Group, LLC* (Dec. 28, 2009), S.D.Ohio No. 2:09-cv-540 (court dismissed implied warranty of merchantability claim without comment). On the other hand, there are cases in which courts have held that UCC statutory implied warranty claims involving personal injury or property damage are not abrogated by

the OPLA. See *Miles v. Raymond Corp.* (N.D. Ohio 2009), 612 F.Supp.2d 913; *CCB Ohio LLC v. Chemque, Inc.* (S.D.Ohio 2009), 649 F.Supp.2d 757. See, also, *White v. Bi-Rite Auto Sales* (Sept. 23, 1996), 4th Dist. No. 95CA35 (court applies UCC § 2-318 to personal injury suit to determine if plaintiff can recover in warranty).

Despite the conflicting authority, the Committee believes that UCC statutory implied warranty claims survive the OPLA. The OPLA *expressly* preempts only all common law product liability claims; neither at the time of its original drafting nor at the time it was modified by S.B. 80 did the General Assembly expressly preempt UCC warranty claims. Had that been the intent of the General Assembly, it could have easily modified the OPLA to do so when it substantially revised the OPLA in S.B. 80 and expressly barred all common law product liability claims. In addition, both the OPLA and the UCC are statutes of equal weight and there is a strong presumption that an earlier statute is not implicitly abrogated by a later statute. *City of Cincinnati v. Thomas Soft Ice Cream, Inc.* (1977), 52 Ohio St.2d 76; *State v. Frey*, 166 Ohio App.3d 819, 2006-Ohio-2452. Only where the provisions of two statutes are irreconcilable by any means of interpretation should a court conclude that an earlier statute has been superseded by a later one. *State v. Ruppert* (1978), 54 Ohio St.2d 263.

1. MERCHANTABILITY WARRANTIES. When a merchant sells goods, a warranty is implied that the goods will be merchantable. You will decide whether the goods were merchantable. To be merchantable, the goods must

(*Use appropriate alternative[s]*)

(A) pass without objection in the trade under the contract description;

(*or*)

(B) be of fair average quality within the description;

COMMENT

This alternative applies to cases involving fungible goods.

(*or*)

(C) be fit for the ordinary purposes for which such goods are used;

(*or*)

(D) be, with the variations permitted by the agreement, of the same kind, quality and quantity, within each (*described unit*) and among all (*described units*) involved;

(*or*)

(E) be adequately contained, packaged, and labeled as required by the agreement;

(*or*)

(F) conform to the promises or affirmations of fact made on the container or label, if any.

COMMENT

All of the above alternatives must be met for the goods to be merchantable; however, the court should instruct only on the alternatives involved. Implied warranties may be excluded or modified. See OJI-CV 505.17 for the appropriate instruction. The Official Comment to R.C. 1302.27 [UCC § 2-314] expands on the statutory language and may be helpful in adding to the instruction.

2. WARRANTIES FROM COURSE OF DEALING OR USAGE OF TRADE. In a contract for the sale of goods, there is a warranty that the goods conform to the (parties' prior course of dealing) (usage of the trade in which the parties are engaged). You will decide if a (course of dealing) (usage of trade) existed that created an implied warranty.

COMMENT

Regarding course of dealing and usage of trade, see R.C. 1301.11 [UCC § 1-205]. See OJI-CV 505.15, exclusion and modification of warranties.

3. COURSE OF DEALING. R.C. 1301.11(C) [UCC § 1-205(3)].

4. USAGE OF TRADE. R.C. 1301.11(B) [UCC § 1-205(2)].

CV 505.15 Implied warranty; fitness for a particular purpose R.C. 1302.28 *[Rev. 5-7-11]*

COMMENT

The Committee believes that a UCC claim for relief based upon the implied warranties of merchantability and fitness has not been eliminated by the Ohio Product Liability Act (OPLA), although state and federal case law applying the OPLA are in conflict.

The OPLA has been held to abrogate all common law product liability claims for relief, including common law claims of implied warranty. R.C. 2307.71(B). See *Miles v. Raymond Corp.* (N.D.Ohio 2009), 612 F.Supp.2d 913. The law, however, is unclear as to whether a UCC statutory implied warranty claim is preempted by the OPLA when the claim involves personal injury or property damages and therefore qualifies as a "product liability" claim under the OPLA. There are at least two Ohio cases in which the courts held that UCC claims of

implied warranty that involved claims of personal injury or property damage are preempted by the OPLA. See *Nadel v. Burger King Corp.* (1997), 119 Ohio App.3d 578, overruled on other grounds by *Bouher v. Aramark Servs.*, 181 Ohio App.3d 599, 2009-Ohio-1597; and *Luthman v. Minster Supply Co.*, 3d Dist. No. 2-06-43, 2008-Ohio-165. There are also a number of cases in which courts have held that the OPLA preempts claims of implied warranty but it is not clear whether the courts include both common law and statutory claims, or merely common law claims. See *Stratford v. SmithKline Beecham Corp.* (June 17, (2008), S.D.Ohio No. 2:07-cv-639; *Barrett v. Waco Int'l, Inc.* (1997), 123 Ohio App. 3d 1; *Allums v. Gillenwater* (April 25, 1996), 8th Dist. Nos. 68870, 68871. See, also, *Donley v. Pinnacle Foods Group, LLC* (Dec. 28, 2009), S.D.Ohio No. 2:09-cv-540 (court dismissed implied warranty of merchantability claim without comment). On the other hand, there are cases in which courts have held that UCC statutory implied warranty claims involving personal injury or property damage are not abrogated by the OPLA. See *Miles v. Raymond Corp.* (N.D.Ohio 2009), 612 F.Supp.2d 913; *CCB Ohio LLC v. Chemque, Inc.* (S.D.Ohio 2009), 649 F.Supp.2d 757. See, also, *White v. Bi-Rite Auto Sales* (Sept. 23, 1996), 4th Dist. No. 95CA35 (court applies UCC § 2-318 to personal injury suit to determine whether plaintiff can recover in warranty).

Despite the conflicting authority, the Committee believes that UCC statutory implied warranty claims survive the OPLA. The OPLA *expressly* preempts only all common law product liability claims; neither at the time of its original drafting nor at the time it was modified by S.B. 80 did the General Assembly expressly preempt UCC warranty claims. Had that been the intent of the General Assembly, it could have easily modified the OPLA to do so when it substantially revised the OPLA in S.B. 80 and expressly barred all common law product liability claims. In addition, both the OPLA and the UCC are statutes of equal weight and there is a strong presumption that an earlier statute is not implicitly abrogated by a later statute. *City of Cincinnati v. Thomas Soft Ice Cream, Inc.* (1977), 52 Ohio St.2d 76; *State v. Frey*, 166 Ohio App.3d 819, 2006-Ohio-2452. Only where the provisions of two statutes are irreconcilable by any means of interpretation should a court conclude that an earlier statute has been superseded by a later one. *State v. Ruppert* (1978), 54 Ohio St.2d 263.

1. GENERAL. An implied warranty of fitness for a particular purpose is created if you find

(A) that the seller had reason to know the intended use of the (*describe goods*);

(B) that the seller had reason to know that the buyer was relying on the seller to furnish (*describe goods*) that would perform the intended use; and

(C) that the buyer did, in fact, rely on the seller's skill and judgment in furnishing (*describe goods*).

The buyer need not have told the seller that the buyer intended to use the (*describe goods*) to (*describe particular purpose*); nor is the buyer required to have told the

seller that the buyer was relying on the seller's skill and judgment to furnish the (*describe goods*) to (*describe particular purpose*). It is sufficient that the seller have reason to know these facts.

COMMENT

See R.C. 1302.28 [UCC § 2-315], Official Comment 1.

CV 505.17 Exclusion or modification of express warranties R.C. 1302.29(A)

1. GENERAL. The seller claims that the disclaimer language contained in the contract document(s) (prevented an express warranty from arising) (limited the extent of the express warranty which was given).

2. DISCLAIMER EFFECTIVE. The disclaimer is effective only if you find that, at

(Text continued on page 499)

the time of the formation of this contract, the buyer knew, or reasonably should have known, that the disclaimer language was in the document and that the disclaimer language was intended to (negate) (limit) the (words) (conduct) which otherwise would have given rise to an express warranty.

3. DISCLAIMER CONSTRUCTION. You must read the disclaimer language as consistent with the (words) (conduct) which created the express warranty, if you can reasonably do so; if you cannot do so, the disclaimer is ineffective.

COMMENT

In many instances only the first two paragraphs of this instruction need be given. Paragraph 3 is given when interpretation or construction of the disclaimer language is required.

This instruction deals with those disputes in which the buyer is claiming that the seller expressly warranted the goods, and the seller is claiming that the disclaimer was effective to negate or limit the express warranty.

An express warranty (that is, an affirmation of fact, promise, description, sample, or model which became a part of the basis of the bargain) cannot be disclaimed or limited. However, the trier of fact must first determine whether the claimed conduct or words of disclaimer (or of limitation) are to be given any effect. If the conduct or words are consistent with the express warranty, they will be given effect; otherwise, the conduct or words are inoperative.

For example, suppose that the seller advertised a used car in the local newspaper. The advertisement stated that the car had a "new engine." When the buyer showed up to purchase the car, and before any deal was struck, the seller notified the buyer that the advertisement was in error-it should have said that the car had a "new muffler." Thereafter, the buyer purchased the car pursuant to a written contract stating that the purchase was made "as is." In this example, there is no express warranty as to the age of the engine because the advertisement did not become a part of the basis of the bargain. Unless the trier of fact determines that the buyer knew or reasonably should have known that the "as is" language withdrew the statement as to the muffler, the "as is" disclaimer is inoperative to disclaim the muffler warranty. The admission of evidence as to the seller's statement about the muffler is subject to the UCC parol evidence rule.

For another example, suppose the buyer purchased a machine described in the contract document as capable of attaining 1,000 revolutions per minute. The document signed by the buyer also contained a paragraph which disclaimed "all warranties, express or implied." Assuming that the statement as to the number of revolutions attainable by the machine would be an express warranty, the disclaimer is inconsistent with the statement and, unless the trier of fact determines that the buyer knew or reasonably should have known that the seller withdrew the statement as to the number of revolutions, the disclaimer is inoperative to disclaim the express warranties.

CV 505.19 Exclusion or modification of implied warranties R.C. 1302.29(B) and (C)

COMMENT

Implied warranties may be excluded or modified. One way to exclude or modify an implied warranty of merchantability is to mention merchantability, and, if in writing, make the exclusion or modification conspicuous. To exclude or modify the implied warranty of fitness for a particular purpose, the exclusion must be in writing and be conspicuous. Whether an exclusion or modification of an implied warranty is conspicuous is a question of law for the Court. Other disputes are to be decided by the trier of fact. R.C. 1301.01(J) [UCC § 1-201(10)]. Those include whether the exclusion was, in fact, a part of the contract between the parties and whether the tests of R.C. 1302.29(C) [UCC § 2-316(3)] have been met. The following instructions assume that the court has given the instruction on the scope of implied warranties.

(*Use when there is a dispute as to whether the exclusion or modification became a part of the parties' agreement*)

1. GENERAL. Whether the implied warranty of (merchantability) (fitness for a particular purpose) was (excluded) (modified) depends upon whether the (exclusion) (modification) was known, or reasonably should have been known, by the buyer prior to the time of the contract for the sale of the goods. The (exclusion) (modification) is effective if you find that the buyer knew or reasonably should have known of the (exclusion) (modification) prior to the contract for sale. Otherwise, the (exclusion) (modification) is not effective.

COMMENT

Even though the seller's form in some manner highlighted the appropriate language (for example, the exclusion was in all capital letters), the form may not be a part of the contract (see R.C. 1302.10 [UCC § 2-207]), or, even if some parts of the form are a part of the contract, the exclusion term may have been neither (a) known by the buyer nor (b) reasonably understood by the buyer to be a part of the contract. See R.C. 1301.01(K) [UCC § 1-201(11)].

(*Use when transaction contains the words "as is," "with all faults," or similar language.*)

2. "AS IS" LANGUAGE. The seller claims that the implied warranty of (merchantability) (fitness for a particular purpose) was excluded by the statement: (*insert contract language*). The statement excludes all implied warranties if the

statement, as commonly understood, was adequate to call the buyer's attention to the exclusion of warranties and made it plain that there were no implied warranties. Otherwise, the statement did not exclude all implied warranties.

(*Use when the goods were, or could have been, examined by the buyer.*)

3. EXAMINATION. If you find that the buyer, before entering into the contract, examined (the goods) (a [sample] [model] of the goods) as fully as the buyer desired or if the buyer refused to examine the goods on the seller's demand, there is no implied warranty with regard to defects which an examination should have revealed to the buyer.

COMMENT

An "inspection" occurs subsequent to the contract for sale, and the buyer's opportunity to inspect must precede acceptance of the goods. See OJI-CV 505.37.

(*Use when there is a dispute as to whether a course of dealing, course of performance, or usage of trade excluded or modified implied warranties.*)

4. OTHER MODIFICATION. The implied warranty of (merchantability) (fitness for a particular purpose) may be (excluded) (modified) by a (course of dealing) (course of performance) (usage of the trade).

5. COURSE OF DEALING. R.C. 1301.11(A) [UCC § 1-205(1)].

6. USAGE OF TRADE. R.C. 1301.11(B) [UCC § 1-205(2)].

7. COURSE OF PERFORMANCE. R.C. 1302.11 [UCC § 2-208].

III. OBLIGATIONS OF THE PARTIES

COMMENT

The UCC continues the basic contract principles of conditional obligations. Unless credit has been extended, the buyer must tender payment to obligate the seller to tender and complete delivery of the goods. The seller must tender delivery to obligate the buyer to accept the goods and, unless credit has been extended, to pay for the goods. A seller's tender can become complicated and call for specific jury instructions, drawn primarily from R.C. 1302.47 and 1302.48 [UCC §§ 2-503 and 2-504]. The basic tender instructions are set out below.

CV 505.21 Tender of payment by buyer R.C. 1302.55

1. GENERAL. The buyer must tender payment before the seller is obligated to deliver the goods.

2. TENDER. Tender of payment consists of the buyer's offer to pay together with the present ability to pay.

COMMENT

The definition of tender of payment is based on the principles contained in Official Comment 1 to R.C. 1302.47 [UCC § 2-503]. The instruction has no application to contracts which have credit terms. See the "Unless otherwise agreed" language of R.C. 1302.55(A) [UCC § 2-511] and Official Comment 1. If a question arises as to the sufficiency of the manner or means of the tendered payment, additional instructions may be required. See R.C. 1302.55(B) [UCC § 2-511(2)]. Payment by check is a conditional tender, defeated if the check is not honored on presentment. R.C. 1302.55(C) [UCC § 2-511(3)].

CV 505.23 Tender of delivery by seller R.C. 1302.51

1. GENERAL. The seller must tender delivery before the buyer is obligated to accept and pay for the goods. This means that the seller must have made available to the buyer goods which conform to the contract, and must have given the buyer reasonable notice so that the buyer could have taken delivery of the goods.

2. TENDER. Tender of delivery in this case also required the seller to do the following:

(*Insert additional factors required by the contract and by R.C. 1302.47 [UCC § 2-503]*).

COMMENT

"Tender" connotes such performance by the seller as will put the buyer in default if the buyer fails to proceed in accordance with the buyer's obligations under the contract. R.C. 1302.47 [UCC § 2-503], Official Comment 1.

If the contract involves tender of documents, the instructions must be modified to indicate that the seller can make conforming goods available to the buyer by tendering documents which give the buyer complete control of the goods. R.C. 1302.47 [UCC § 2-503], Offical Comment 2. If the contract requires shipment by the seller, tender requires that the seller comply with the provisions of R.C. 1302.48 [UCC § 2-504].

IV. SELLER'S REMEDIES

COMMENT

See Introductory Comment to OJI-CV Chapter 505

The principal remedies of a seller are indexed in R.C. 1302.77 [UCC § 2-703]. Those remedies are conditioned on the occurrence of one of the four triggering events listed in that section. In addition, the seller has remedies on discovery of the buyer's insolvency (R.C. 1302.76 [UCC § 2-702]) and when the buyer does not pay the price as it becomes due (R.C. 1302.83 [UCC § 2-709]). The seller can recover incidental damages under R.C. 1302.84 [UCC § 2-710].

CV 505.25 Seller's resale remedy R.C. 1302.80

1. DAMAGES ON RESALE. If you find that the buyer breached the contract and the seller resold the goods, the seller is entitled to recover the amount by which the unpaid contract price exceeds the resale price if the resale was made in good faith and in a commercially reasonable manner.

2. COMMERCIALLY REASONABLE MANNER. The method, manner, time, place, and terms of the resale, including the seller's choice to sell at a (public) (private) sale, must all have been commercially reasonable. Whether a resale is commercially reasonable depends upon such things as the nature of the goods, the condition of the market, and all other facts and circumstances in evidence. It is not necessary that the seller have made the best possible resale, or that the seller resold the goods at the market price, so long as the seller acted in a commercially reasonable manner at the time of the resale.

3. PRIVATE SALE. You must also find that the seller gave the buyer reasonable notice of the intention to resell.

4. PUBLIC SALE. You must also find: (1) that the sale was made at a usual (place) (market) for public sales of this type of goods (unless such a [place] [market] was not reasonably available), and (2) that the seller gave the buyer reasonable notice of the time and place of resale (unless the [goods were perishable] [threatened to decline speedily in value]).

COMMENT

It is unlikely that this instruction will have to be given in its entirety. For example, there may be no factual dispute over whether the public sale was made at the usual place or market for such sales, thus eliminating the need for that instruction. Similarly, there may be no factual question involving the perishability of the goods or the likelihood that they will speedily decline in value. If

this is the case, it will not be necessary to include that portion of the instruction establishing an exception to the requirement for reasonable notice of a public sale to the buyer.

5. INCIDENTAL DAMAGES. OJI-CV 505.31.

6. EXPENSES SAVED. You will deduct from the seller's recovery any expenses which the seller saved as a result of the buyer's breach.

COMMENT

If there is evidence that the breach has saved the seller expenses, the judge should instruct that such savings are to be deducted from the recovery. Deductions are not appropriate simply because the buyer's breach has eliminated the need for the seller to make certain expenditures (e.g., shipping costs) in connection with the contract. If the seller must make the same expenditure to realize the value of the goods, these expenses are not "saved" and should not be deducted from the seller's recovery, and no instruction concerning expenses saved would be necessary.

7. IMPROPER RESALE. If you find that the seller's resale was not made in good faith or in a commercially reasonable manner or that proper notice was not given, you will consider the following damages.

COMMENT

When a resale is not made in a commercially reasonable manner, resale becomes irrelevant and damages are measured under R.C. 1302.82(A) [UCC § 2-708(1)]. See OJI-CV 505.27.

Even though the goods have been resold, the seller's resale remedy is not appropriate when resale damages would undercompensate the seller. This is true when the seller is claiming to be a "lost volume" seller, i.e., that had the original buyer not breached, the seller could have made a second sale anyway. In such a case damages are appropriately measured under R.C. 1302.82(B) [UCC § 2-708(2)]. See OJI-CV 505.27 for a more detailed explanation of a lost volume seller. See also *Neri v. Retail Marine Corp.* (1972), 30 N.Y.2d 393, 285 N.E.2d 311.

CV 505.27 Seller's damages for non-acceptance or repudiation R.C. 1302.82

COMMENT

The following instructions deal with situations in which the resale remedy is

not applicable. Section 1 is intended for cases in which the measure of recovery is based on the difference between the unpaid contract price and the market price of the goods. Sections 3 and 4 are intended for cases in which the seller claims that the measure of damages in Section 1 does not adequately compensate the seller.

1. UNPAID CONTRACT PRICE MINUS MARKET VALUE. If you find that the buyer breached the contract and that the buyer has not accepted the goods or that the seller has taken them back, the seller is entitled to the amount by which the unpaid contract price of those goods exceeds the market price at (*insert the time and place of tender*). (From this amount subtract any expenses saved by the seller as a result of the buyer's breach.)

2. EXAMPLE (OPTIONAL). For example, if the contract price with the buyer was $100 and the market price of the goods was $70, the seller's damages would be $30. (If the seller suffered incidental damages of $10, these would be added.) (If the buyer paid a deposit of $15, this amount would be deducted.) (If the seller saved $15 as a result of the buyer's breach, this amount would be deducted.)

COMMENT

This instruction represents the standard measure of damages when the buyer repudiates the contract or wrongfully rejects the goods. It is also the proper measure of damages when the buyer revokes acceptance without justification and the seller retakes possession of the goods. If the seller does not retake possession of the goods after a wrongful revocation of acceptance, the appropriate remedy is an action for the price. See R.C. 1302.83 [UCC § 2-709] and OJI-CV 505.29. For determination of market price, see R.C. 1302.97 [UCC § 2-723].

Unless the time and place of tender is in dispute, the trial judge should insert the time and place of tender in the charge. The time and place of tender is determined by reference to R.C. 1302.47 and 1302.48 [UCC §§ 2-503 and 2-504] and by the terms of the contract, including such mercantile terms as FOB, FAS, CIF, C&F, Ex Ship and No Arrival, No Sale. R.C. 1302.32-.35, 1302.37 [UCC §§ 2-319-322, 2-324].

If there is evidence that the breach has saved the seller expenses, the judge should instruct that such savings are to be deducted from the recovery. Deductions are not appropriate simply because the buyer's breach has eliminated the need for the seller to make certain expenditures (e.g., shipping costs) in connection with the contract. If the seller will have to undergo the same expenditure to realize the value of the goods (e.g., through resale in the same market) these expenses are not "saved" and should not be deducted from the seller's recovery, and no instruction concerning expenses saved would be necessary.

3. LOST VOLUME SELLER—DISPUTED STATUS.

COMMENT

In some cases neither the contract-market differential nor the contract-resale differential will adequately compensate the seller. For example, suppose an automobile dealer entered into a contract with a buyer for the sale of a new automobile for $18,000. The dealer had other models like the one under contract and could obtain more from the manufacturer in a few days. The buyer repudiated the contract, and a few days later the dealer sold the same car to a third party for $18,000. Neither the contract-resale difference, nor the contract-market difference will produce any damages (assuming the market price is $18,000). Yet had the original buyer not repudiated, the seller may have made the second sale anyway, thus having the profits from two contracts. If the buyer had not defaulted, the seller would have had one more profit than actually received. The seller in this situation is referred to as a "lost volume seller," and R.C. 1302.82(B) [UCC § 2-708(2)] permits the seller to recover this lost profit.

The following instruction is intended for use when there is a dispute over whether the seller is a lost volume seller or otherwise entitled to a lost profit.

If you find that damages measured by the difference between the unpaid contract price and (the market price of the goods) (the resale price) is not adequate to put the seller in as good a position as if the buyer had performed the contract, then the seller is entitled to the profit that the seller would have made on the breached contract. To calculate the seller's profit, begin with the contract price and subtract the following: (1) the amount of any down payment or deposit made by the buyer and retained by the seller, (2) (the cost of the goods to the seller) (the seller's wholesale price), and (3) any other expenses saved by the seller as a result of the buyer's breach.

4. LOST VOLUME SELLER—STATUS UNDISPUTED.

COMMENT

The following instruction is intended for use when there is no dispute that the seller is a lost volume seller or otherwise entitled to a lost profit.

If you find that the buyer has breached the contract and that the buyer has not accepted the goods or that the seller has taken them back, the seller is entitled to the profit that the seller would have made on the breached contract. To calculate the seller's profit, begin with the contract price and subtract the following: (1) the amount of any down payment or deposit made by the buyer and retained by the seller, (2) (the cost of the

goods to the seller) (the seller's wholesale price), (3) any expenses saved by the seller as a result of the buyer's breach.

COMMENT

A seller is not a lost volume seller when the second sale could not have been made but for the first buyer's breach. Thus, these instructions are not appropriate when the seller is a casual seller of an item or when the seller could not have interested the subsequent buyer had it not been for the breach, e.g., the item is unique. Also, this measure does not apply to the volume seller who does not have a sufficient supply to meet the seller's total demand.

There is a dispute over whether a seller is entitled to the contract-market differential if the seller's actual lost profit is less than the contract-market differential. While academic commentary is divided and the case law sparse, *Nobs Chemical, U.S.A., Inc. v. Koppers Co., Inc.* (C.A.5, 1980), 616 F.2d 212, limits the seller to the lost profits.

R.C. 1302.82(B) [UCC § 2-708(2)] requires that the buyer receive "due credit for the proceeds of resale." This could, but should not, be read to require a deduction from the seller's recovery for the proceeds of resale when the seller is a lost volume seller. To deduct the proceeds of the resale would result in nothing more than awarding the contract-resale differential and would negate the intent of the section to compensate adequately the lost volume seller. See Nordstrom, Law of Sales (1970), Section 177; *Snyder v. Herbert Greenbaum & Assocs., Inc.* (Md. App. 1977), 380 A.2d 618; *Neri v. Retail Marine Corp.* (1972), 30 N.Y.2d 393, 285 N.E.2d 311. The measure of lost profit is the contract price minus the variable costs saved on the lost contract.

Fixed costs (overhead) are not a part of the "cost" of the lost volume seller. *Vitex Mfg. Corp. Ltd. v. Caribtex Corp.* (C.A.3, 1967), 377 F.2d 795. Depending on the facts of the case, it may be necessary for the court to explain what constitutes the "cost."

5. INCIDENTAL DAMAGES. OJI-CV 505.31.

6. EXPENSES SAVED. See Comment to § 2 of this Instruction.

CV 505.29 Seller's action for the price R.C. 1302.83

1. GENERAL. The seller is entitled to recover the contract price for the goods if you find that the price is due under the terms of the contract with the seller, and

(*Use appropriate alternative*)

(A) the buyer has accepted the goods and has not rightfully revoked that acceptance.

COMMENT

The word "accepted" has a legal meaning that may be different from the way the word is used in ordinary conversation. See OJI-CV 505.37 for instructions on acceptance and OJI-CV 505.39 for instructions on revocation of acceptance.

(or)

(B) the risk of loss of the goods had passed to the buyer and, within a commercially reasonable time thereafter, the goods were (lost) (damaged).

COMMENT

Whether the risk of loss has passed to the buyer is determined by R.C. 1302.53 [UCC § 2-509] and R.C. 1302.54 [UCC § 2-510]. R.C. 1302.53 governs the risk of loss if the goods are damaged or destroyed and neither party is in breach of the contract at the time of the damage or destruction. R.C. 1302.54 governs the risk of loss where one of the parties is in breach at the time the damage or destruction occurs.

Whether the risk of loss has passed to the buyer will generally be a question of law. There may, however, be factual questions that must be resolved prior to the determination of whether the risk has passed. Foremost among these is the issue of whether either party was in breach prior to the damage or destruction of the goods, since this will determine whether R.C. 1302.53 or R.C. 1302.54 is applicable. See OJI-CV 505.21 and OJI-CV 505.23. More rarely, the finder of fact may be required to determine whether the contract requires or authorizes the seller to ship the goods by carrier under R.C. 1302.53(A) and whether the contract is a contract not requiring delivery at a particular destination (a "shipment" contract) or one which requires delivery at a particular destination ("destination" contract). See § 1302.48 [UCC § 2-504]. Under R.C. 1302.54 the finder of fact may also have to determine whether there has been an "acceptance" (see OJI-CV 505.37) or a rightful revocation of acceptance (See OJI-CV 505.39).

R.C. 1302.83(A)(1) permits recovery of the price only if the buyer has accepted the goods or if the goods are lost or damaged within a commercially reasonable time after their risk of loss has passed to the buyer. If, after a commercially reasonable time after the risk of loss has passed to the buyer, the buyer has not yet accepted the goods, the risk of loss reverts to the seller. What is a "commercially reasonable time" depends upon the nature, purpose and circumstances of the contract, the goods involved, and any usage of trade, course of dealing, or course of performance. See R.C. 1301.10. The purpose of the provision is to give the seller a reasonable opportunity to retrieve the goods upon the buyer's non-acceptance before the risk of loss passes back to the seller.

(*or*)

(C) the goods have been identified to the contract and (the seller is unable, after making reasonable efforts, to resell the goods at a reasonable price) (the circumstances indicate that reasonable efforts to resell the goods would be unsuccessful).

COMMENT

If identification of goods to the contract is an issue, the judge will be required to prepare appropriate instructions. See R.C. 1302.45 [UCC § 2-501].

2. INCIDENTAL DAMAGES. OJI-CV 505.31.

3. ACCEPTANCE. OJI-CV 505.37.

4. REVOCATION OF ACCEPTANCE. OJI-CV 505.39.

CV 505.31 Seller's incidental damages R.C. 1302.84

1. GENERAL. If you find that the buyer has breached the contract, the seller is (also) entitled to recover incidental damages. If you find that the seller has proved damages for commercially reasonable charges, expenses or commissions incurred in (stopping delivery) (the transportation of the goods) (the care and custody of the goods after the buyer's breach) (in connection with return or resale of the goods), you shall award those damages.

CV 505.33 Limitation of seller's remedies R.C. 1302.93

COMMENT

R.C. 1302.93 [UCC § 2-719] applies to those rare instances in which an agreement attempts to limit the seller's remedies.

1. GENERAL. The parties may limit the remedies available to a seller who claims that the buyer breached the contract of sale. In this case, the buyer is claiming that the following provision(s) limit(s) the seller's remedies: (*insert applicable contract provision[s]*). Before (that provision is) (those provisions are) enforceable against the seller, you must find both of the following:

(A) that the buyer and the seller expressly agreed that the remedy(ies) described in (that provision was) (those provisions were) to be the only remedy(ies) available to the seller upon a breach by the buyer; and

(B) that the (provision does) (the provisions do) not prevent the seller from receiving the price within a reasonable time following the date payment was due. If you find for the buyer on both of these points, the seller is not entitled to recover (*describe damages precluded by limitation*).

COMMENT

A seller is normally entitled to the price for the goods sold. An attempt to limit the damages to less than the price calls for the application of the rules of liquidated damages and penalties. See R.C. 1302.92 [UCC § 2-718]. Therefore, only an atypical case will present a limitation of a seller's remedies.

V. BUYER'S REMEDIES

COMMENT

See Introductory Comment to OJI-CV Chapter 505.

When a buyer retains defective goods the remedy contained in R.C. 1302.88 [UCC § 2-714] applies. When the buyer does not end up with the goods, the buyer has the remedies listed in R.C. 1302.85 [UCC § 2-711].

Some of the remedies listed in R.C. 1302.85 [UCC § 2-711] are conditioned on rejection and revocation of acceptance. The concepts of rejection and revocation of acceptance replace the pre-code notions of remedies based on recission. If the goods or the tender of delivery fails "in any respect to conform to the contract," the buyer has three choices: (1) to reject all of the goods; (2) to accept all of the goods; or (3) to accept some commercial units and reject the rest. R.C. 1302.60 [UCC § 2-601].

Rejection. R.C. 1302.60 [UCC § 2-601] adopts the perfect tender rule. However, its application must be viewed with caution. R.C. 1302.52 [UCC § 2-508] allows the seller to cure an improper tender or delivery. R.C. 1302.48 [UCC § 2-504] (dealing with shipment contracts) allows rejection for breach under that section "only if material delay or loss ensues." R.C. 1302.70 [UCC § 2-612] adopts a different rule with respect to installment contracts.

Further dilution of the perfect tender rule is effected by R.C. 1302.11 [UCC § 2-208] which makes trade usage, course of dealing, and course of performance factors that bear on the interpretation of contracts. R.C. 1301.09 [UCC § 1-203] may also be used to negate a rejection based on "bad faith." White and Summers, Uniform Commercial Code (Pract. Ed. 3 Ed.1988) 401-02.

Rejection requires notice to the seller and must occur within a reasonable time after delivery or tender. R.C. 1302.61 [UCC § 2-602]. The same code section provides that, after rejection, (1) any exercise of ownership by the buyer is wrongful as against the seller and (2) if the buyer does not have a security interest, the buyer must hold the goods with reasonable care for a time sufficient for the seller to remove them. The buyer's duty to "hold" varies depending on whether the buyer is a merchant or a non-merchant. This duty is the same when the buyer has revoked acceptance and is covered in OJI-CV 505.41.

Acceptance. "Acceptance" is defined in R.C. 1302.64 [UCC § 2-606]. Acceptance precludes rejection and occurs only if one or more of the tests of R.C. 1302.64 [UCC § 2-606] have been met. R.C. 1302.65 [UCC § 2-607]. If the buyer accepts non-conforming goods (or goods for which there was a non-conforming tender), the buyer who has given the proper notice may elect either (1) to retain the goods and collect damages (R.C. 1302.88 [UCC § 2-714]) or (2) if the buyer meets the tests of R.C. 1302.66 [UCC § 2-608], to revoke that acceptance and force the goods back on the seller.

Revocation of acceptance. The tests for revocation of acceptance are different from those for rejection. Revocation of acceptance requires: (1) a non-conformity (as determined by the terms of the contract) which results in "a substantial impairment of value to the buyer"—as compared to the test for rejection, which is when the goods or tender of delivery "fails in any respect to conform to the contract"; (2) timely notice to the seller; and (3) the acceptance must have been either (a) without discovery of the non-conformity, if acceptance was induced either by the difficulty of discovery before acceptance or by the seller's assurances, or (b) if with knowledge of the non-conformity, with the reasonable assumption that the non-conformity would be cured and it was not seasonably cured. R.C. 1302.66 [UCC § 2-608]. See R.C. 1301.10 [UCC § 1-204]. The instruction for revocation of acceptance is provided in OJI-CV 505.39.

CV 505.35 Buyer's rejection R.C. 1302.60

If you find that the (goods) (the seller's tender of delivery of the goods) failed in any respect to conform to the contract, the buyer's (rejection of the goods) (acceptance of the goods) (acceptance of any commercial unit or units and rejection of the rest) was proper.

COMMENT

This instruction is not given if the contract is an installment contract as defined in R.C. 1302.70 [UCC § 2-612]. Nor is it given if the parties have agreed otherwise under R.C. 1302.92 [UCC § 2-718] or R.C. 1302.93 [UCC § 2-719]. In these situations, instructions on contractual limitations of remedy should be given. See OJI-CV 505.53. "Commercial unit" is defined in R.C. 1302.01(A)(10) [UCC § 2-105].

For instructions relating to damages for accepted goods, see OJI-CV 505.45.

CV 505.37 Buyer's acceptance of the goods R.C. 1302.64

1. ACCEPTANCE BY WORDS OR CONDUCT. If you find that the buyer had a reasonable opportunity to inspect the goods and after such reasonable opportunity, the buyer signified to the seller by (words) (conduct) that (the goods conformed to the

contract) (that the buyer would keep the goods in spite of their non-conformity), then the buyer has accepted the goods.

2. ACCEPTANCE BY FAILURE TO REJECT EFFECTIVELY. If you find that the buyer had a reasonable opportunity to inspect the goods and after such reasonable opportunity, the buyer failed to make an effective rejection of the goods, the buyer has accepted the goods. In order to make an effective rejection, the buyer must, within a reasonable time after the seller has made the goods available, notify the seller that the buyer is rejecting the goods. What is a "reasonable time" depends on all the facts and circumstances in evidence.

3. ACCEPTANCE BY INCONSISTENT ACTS. If you find that the buyer, after rejecting the goods, has taken action that is inconsistent with the seller's ownership, then the buyer has accepted the goods unless that action was reasonably necessary to (preserve) (protect) the goods or minimize damages caused by the seller's breach.

COMMENT

The buyer's right to inspect the goods is detailed in R.C. 1302.57 [UCC § 2-513], Official Comment 3. Notice of rejection may be implied from conduct. *Kabco Equip. Specialists v. Budgetel, Inc.* (1981), 2 O.App.3d 58, 440 N.E.2d 611.

If acceptance occurs as a result of action inconsistent with the seller's ownership, the seller has the option to consider the buyer's action as an acceptance or to treat the goods as rejected. Official Comment 4 to R.C. 1302.65 [UCC § 2-607]. Use or sale of the goods pursuant to the proper exercise of a security interest by the buyer, however, is not an acceptance. R.C. 1302.85 [UCC § 2-711].

CV 505.39 Buyer's revocation of acceptance R.C. 1302.66

1. A buyer who has accepted goods may revoke that acceptance if the (*describe non-conformity*) substantially impaired the value of the goods to the buyer and if the buyer accepted the goods (on the reasonable assumption that the non-conformity would be cured and it was not seasonably cured) (without discovery of the non-conformity if the acceptance was caused [by difficulty of discovery before the goods were accepted] [by assurances of the seller]).

2. Whether the (*describe non-conformity*) substantially impaired the value of the goods to this buyer is to be decided by you from the facts and circumstances in evidence, considering the buyer's individual tastes and particular needs.

3. The (*describe non-conformity*) substantially impaired the value of the goods if the (*describe non-conformity*) reasonably undermined this buyer's faith in the integrity and reliability of the goods.

COMMENT

The proper test for substantial impairment under R.C. 1302.66 [UCC § 2-608] focuses on the particular needs, circumstances, and tastes of the specific buyer. In order for a defect to substantially impair the value of the goods to *this* buyer, it is not necessary that the defect substantially impair the value of the goods to the average buyer, the reasonable buyer, or the reasonably foreseeable buyer. For any remedy to apply under the UCC, however, there must first be a non-conformity. Whether a non-conformity exists presents the question of the quality of the goods the seller was required to provide to conform to the contract, and issues of reasonableness may arise on this question.

In addition, the determination that a defect substantially impairs the value of the goods to the buyer must be based on objective evidence of the buyer's tastes and needs; the buyer's mere assertion of substantial impairment, without more, is not sufficient. *McCullough v. Bill Swad Chrysler-Plymouth, Inc.* (1983), 5 Ohio St.3d 181, 449 N.E.2d 1289; Travalio, The UCC's Three R's: Rejection, Revocation, and (The Seller's) Right to Cure (1984), 53 U.Cin.L.Rev. 931.

Any defect that reasonably shakes the buyer's faith in the goods or undermines the buyer's confidence in their reliability and integrity is a substantial impairment. The right of revocation is not, however, limited to these defects, but includes any defect that substantially impairs the value of the goods to this buyer.

4. The buyer must notify the seller of the revocation of acceptance, and the revocation is not effective until the notice is given. The revocation must occur within a reasonable time after the buyer (discovered) (should have discovered) the (*describe non-conformity*) and before there is any substantial change in the condition of the goods which did not result from (*describe non-conformity*).

COMMENT

See R.C. 1301.10 [UCC § 1-204] for the definition of "reasonable time."

CV 505.41 Buyer's obligations after revocation of acceptance R.C. 1302.61, 1302.66

COMMENT

A buyer who revokes acceptance of the goods and has incurred expense in connection with those goods has a security interest in the goods, which means that the buyer may retain possession of the goods until reimbursed for the payments made and for certain expenses. If the facts of the case call for a

security interest, a further instruction may be needed. The rules for a merchant differ from those for a non-merchant.

Typical situations involving the application of these instructions involve (1) the retailer who has ordered 500 video cassette recorders for resale and (2) the consumer who purchased an automobile for personal use. Both the retailer (merchant) and the consumer (non-merchant), after paying some or all of the purchase price, discover a non-conformity which substantially impairs the value to the buyer. The UCC draws a distinction between the duties of a non-merchant and a merchant buyer following revocation of acceptance, but neither is required to surrender possession of the goods as a condition to revocation of acceptance. Both have a security interest in the goods to cover the payments and other expenses mentioned in the instructions. See R.C. 1302.85(C) [UCC § 2-711(3)]. Assuming the seller has no place of business or agent at the place of revocation of acceptance, the merchant buyer is required to follow reasonable instructions of the seller and must resell certain types of goods even if there are no instructions. R.C. 1302.66(C) [UCC § 2-608(3)] and R.C. 1302.62 [UCC §§ 2-603; 2-604]. Continued use of the goods after revocation of acceptance does not necessarily imply that the non-conformities do not substantially impair the value of the goods to the buyer. "Merchant" is defined in R.C. 1302.01(A)(5) [UCC § 2-104(1)].

1. OBLIGATIONS OF BUYER. A buyer who revokes acceptance may keep possession of the goods for any payments made on their price and expenses incurred in their inspection, receipt, transportation, care and custody. A buyer may resell the goods (*under the conditions stated in OJI-CV 505.25*) if the seller does not pay these obligations within a reasonable time. A buyer who has revoked acceptance must take reasonable care of the goods while they are in the buyer's possession. Reasonable care depends on the facts and circumstances in evidence.

2. MERCHANT BUYER: ADDITIONAL. A merchant buyer who has revoked acceptance must also follow reasonable instructions from the seller. Reasonable instructions depend on the facts and circumstances in evidence.

3. MERCHANT BUYER: ADDITIONAL. In the absence of such instructions, a merchant buyer must make reasonable efforts to resell goods which (are perishable) (threaten to decline in value speedily).

CV 505.43 Buyer's damages for nondelivery, repudiation, rejection, and revocation of acceptance R.C. 1302.87

COMMENT

This instruction applies only when the seller has breached the contract and the buyer has not accepted the goods or has justifiably revoked acceptance.

1. GENERAL. If you find that the seller has breached the contract, the buyer is entitled to recover the amount by which the market price of the (*describe goods*) at the time the buyer learned of the breach exceeds the unpaid contract price (less any expenses saved as a result of the seller's breach).

COMMENT

If proof of incidental or consequential damages has been introduced see OJI-CV 505.51.

2. MARKET PRICE. The market price of the (*describe goods*) is the price at the (place for tender) (place of arrival).

COMMENT

If there is a nondelivery or repudiation by the seller, the market price is determined at the place of the tender. If the buyer has rejected the goods or justifiably revoked acceptance, the market price is determined at the place of arrival.

See R.C. 1302.89 [UCC § 2-715] for definitions of incidental and consequential damages. See R.C. 1302.97 [UCC § 2-724] regarding proof of market price. See R.C. 1302.47 [UCC § 2-503], 1302.48 [UCC § 2-504] regarding "place of tender."

3. INCIDENTAL DAMAGES. OJI-CV 505.51.

CV 505.45 Buyer's damages for breach of warranty of accepted goods R.C. 1302.88(B)

1. GENERAL. If you find that the seller breached a warranty and the buyer accepted the goods, the buyer is entitled to the difference between the value of the goods at the time and place the buyer accepted them and the value they would have had if they had been as the seller warranted. To measure these damages you first must determine the value of the goods as warranted. Then subtract the value of the goods as accepted. The difference is the seller's damages.

COMMENT

For instructions relating to breach of warranty, see OJI-CV 505.11, OJI-CV 505.13, OJI-CV 505.15, and OJI-CV 505.17. Acceptance of the goods is determined according to the provisions of R.C. 1302.64 [UCC § 2-606]. Recovery for breach of warranty is predicated on the buyer's giving adequate notice of breach under R.C. 1302.65 [UCC § 2-607], and thus a determination by the jury may be necessary as to whether such notice was given. Also,

incidental and consequential damages may be recoverable in addition to the measure of damages indicated in this section. See R.C. 1302.89 [UCC § 2-715].

While the measure of damages in this section will apply in the overwhelming number of cases when goods have been accepted, R.C. 1302.88 [UCC § 2-714] permits the Court to award "proximate damages of a different amount" when appropriate.

2. INCIDENTAL DAMAGES. OJI-CV 505.51.

CV 505.47 Buyer's notice of breach; accepted goods R.C. 1302.65

1. GENERAL. A buyer who has accepted goods must notify the seller of any claimed breach by the seller or be barred from any recovery. The notice may be written or oral. The notice is sufficient if it alerts the seller that there is a problem with the goods. It need not state all that is wrong with the goods.

2. NOTICE. The notice must be given by the buyer within a reasonable time after the buyer (discovered) (should have discovered) the breach. If the buyer did not give such notice, the buyer is barred from any remedy against the seller even if the seller was not harmed by the failure to give proper notice.

COMMENT

See R.C. 1302.65(C)(1) [UCC § 2-607(3)(a)]. This section applies only if the buyer has accepted the goods, but notice is also needed to make an effective rejection. See the Comment preceding OJI-CV 505.33. If the buyer has accepted the goods, notice of the non-conformity must be given to the seller. The purpose of notice is to alert the seller that the buyer believes that something is wrong with the goods, as measured by the contractual obligations of the seller. The required content of the notice will vary depending upon whether the buyer is a merchant (see R.C. 1302.01(A)(5) [UCC § 2-104]) or a consumer. See Official Comment 4 to R.C. 1302.65 [UCC § 2-607]. If the buyer gave notice and the seller attempted to repair, the buyer must give further notice if the buyer now claims that the attempted repairs failed.

Reasonable time is defined in R.C. 1301.10 [UCC § 1-204].

CV 505.49 Buyer's "cover" damages R.C. 1302.86

COMMENT

The following instruction assumes that the buyer is seeking "cover" damages from the seller—that is, the difference between what it cost the buyer to purchase substitute goods and the price the buyer agreed to pay the seller.

1. GENERAL. If you find that the seller breached the contract and that the buyer made a reasonable purchase of substitute goods in good faith and without unreasonable delay, the buyer is entitled to recover the amount by which the cost of the substitute goods exceeded the contract price.

2. REASONABLE PURCHASE. In deciding whether the buyer made a reasonable purchase of substitute goods in good faith and without unreasonable delay, you must consider how a reasonable buyer at the time and place the buyer purchased the (*describe substitute goods*) would have acted. The fact that hindsight may show that the buyer might have purchased the (*describe substitute goods*) more cheaply or more effectively does not necessarily mean that the purchase was either unreasonable or made in bad faith.

3. DAMAGES. If you find that the buyer is entitled to damages from the seller, those damages, if any, are computed as follows:

(A) Decide the cost of the substitute purchase;

(B) Subtract the price which the buyer agreed to pay for the contract goods;

(C) (Add any payments made to the seller by the buyer on the contract price);

(D) (Add any incidental or consequential damages sustained by the buyer as a result of the default);

(E) (Subtract any expenses saved by the buyer as a consequence of the default).

COMMENT

Assume that the contract between the buyer and the seller required the seller to deliver a new tractor for $22,000 plus delivery charges of $500; the buyer paid $3,000 down; the seller failed to deliver; the buyer purchased another tractor for $24,000 with no delivery charges; and that the substitute purchase was a reasonable purchase.

The buyer would be entitled to damages measured as follows:

$24,000	the cost of the substitute purchase
– 22,000	the original contract price
$ 2,000	
+ 3,000	the down payment
$ 5,000	
– 500	the expenses saved
$ 4,500	

To this number would be added any incidental or consequential damages as defined in R.C. 1302.89 [UCC § 2-715].

If the contract is silent as to the price, the "contract price" is a "reasonable price at the time of delivery." See OJI-CV 505.05.

4. IMPROPER COVER. If you find that the buyer did not make a reasonable purchase in good faith and without unreasonable delay, you will consider the following damages.

COMMENT

When the buyer has not properly covered, cover becomes irrelevant and damages are measured under R.C. 1302.87 [UCC § 2-713]. See OJI-CV 505.43.

5. INCIDENTAL DAMAGES. OJI-CV 505.51.

CV 505.51 Buyer's incidental and consequential damages R.C. 1302.89

1. INCIDENTAL DAMAGES. If you find that the seller breached the contract, the buyer (also) is entitled to recover incidental damages. These include expenses reasonably incurred in (inspection, receipt, transportation, and care and custody of goods rightfully rejected) (any commercially reasonable charges, expenses or commissions in connection with purchasing substitute goods) (*describe other reasonable expense incident to breach*).

COMMENT

The purpose of incidental damages is to allow recovery for transactional costs associated wtih breach. Such incidental damages are difficult to categorize. R.C. 1302.89(A) [UCC § 2-715(1)] lists items that are most frequently encountered when there is a breach either by delay or otherwise. However, general language is included in the UCC to make it clear that the enumeration therein is illustrative and not exhaustive.

2. CONSEQUENTIAL DAMAGES. If you find that the seller has breached the contract, the buyer is (also) entitled to recover for any loss resulting from the buyer's general or specific requirements of which the seller had reason to know at the time the contract was made. However, these damages are not to be awarded to the extent that the buyer could have reasonably prevented them by purchasing substitute goods or otherwise.

COMMENT

R.C. 1302.89(B) [UCC § 2-715] is the UCC's version of *Hadley v.*

Baxendale (1854), 9 Ex. 345, 156 Eng. Rep. 145. The UCC adopts the common law "reason to know test," but liberalizes it by eliminating the tacit agreement rule which had, in some cases, been a gloss on *Hadley v. Baxendale*. However, the liberality of the rule is also constricted; the section does not permit damages which could reasonably be prevented by cover or otherwise.

This instruction does not cover injury to person or property resulting from breach of warranty. See R.C. 1302.89(B)(2) [UCC § 2-715(2)(b)].

CV 505.53 Limitation of buyer's remedies R.C. 1302.93

1. GENERAL. In this case, the seller is claiming that the following provision(s) limit(s) the buyer's remedies:

(*Insert applicable contract provision[s]*)

Before (that) (those) provision(s) (is) (are) enforceable against the buyer, you must find both of the following:

(A) that the seller and the buyer expressly agreed that the remedy(ies) described in (that) (those) provision(s) (was) (were) to be the only remedy(ies) available to the buyer upon a breach by the seller; and

(B) that the provision(s) do(es) not prevent the buyer from receiving (conforming goods) (a refund of the purchase price) within a reasonable time following the agreed-upon delivery date.

If you find for the seller on both of these points the buyer is not entitled to recover (*describe damages precluded by limitation*).

COMMENT

The UCC provides a buyer with several different remedies, ranging from value damages to cover and specific performance or replevin. However, the UCC also allows the parties to supplement or limit their remedies. The above instruction deals with the more typical situation (often found in form contracts); that in which the written document contains a provision limiting the buyer's remedy, normally to repair, replacement, or refund of the purchase price. See R.C. 1302.93 [UCC § 2-719]. Before that provision is enforceable, the finder of fact must determine that the provision was expressly agrees to as part of the total agreement of the parties. This could require an analysis of the agreement sections of the UCC (R.C. 1302.07-1302.11 [UCC §§ 2-204-2-208]), depending on the facts of the particular dispute.

Even if the provision was expressly agreed upon, the buyer is entitled to UCC remedies when circumstances cause an exclusive remedy to fail of its essential purpose. R.C. 1302.93 [UCC § 2-719]. A limited remedy does not fail of its essential purpose just because it does not provide the buyer with the UCC remedies. More must be shown. Paragraph 2 of the instruction states what must be proved: that the repair or replacement did not bring the goods up to their

warranted condition, and, if a refund provision is included in the limited remedy provision, the seller has not refunded the purchase price. Failure to attempt repairs would also be the "something more" that must be shown.

If consequential damages are involved in the limitation of remedies dispute, the court, as a matter of law, must determine whether the limitation is unconscionable. See R.C. 1302.15 [UCC § 2-302]. Under R.C. 1302.89(B) [UCC § 2-715(2)], any limitation of consequential damages for personal injury is prima facie unconscionable, and the court should follow the procedure stated in R.C. 1302.15(B) [UCC § 2-302(2)].

Contractual limitation of remedies is also subject to the rules as to liquidated damages. R.C. 1302.92 [UCC § 2-718]. If the limitation of remedies provision states a specific amount that the buyer may recover in the event of default (say, $100), that UCC section must be consulted.

Chapter CV 509

GUARANTY

CV 509.01	Definitions (New)
CV 509.03	Liability (New)
CV 509.05	Affirmative defenses (New)
CV 509.07	Damages OJI-CV 501.33, OJI-CV 501.35

CV 509.01 Definitions (New)

A guaranty is an express written agreement between the guarantor and the creditor (obligee) to answer for the debt, promise or performance of the principal debtor; it is independent of and collateral to the separate contract between the creditor and the principal debtor. The principal debtor is not a party to the guaranty, and the guarantor is not a party to the underlying contract; the promise of the guarantor and the promise of the principal debtor are independent of each other. The obligation of the guarantor is determined by the contract of guaranty, not the underlying contract. *Solomon Sturges & Co. v. Bank of Circleville* (1860), 11 Ohio St. 153, 168. In general, the law of contracts applies to the existence, interpretation and enforceability of contracts of guaranty.

1. GENERAL. A guaranty is created when one person agrees to answer for the (debt) (promise) (performance) of another person who has obligated himself to a third person by an independent (promise) (contract). The person who makes that agreement to cover the (debt) (promise) (performance) of the other person is the guarantor. The person whose (debt) (promise) (performance) is guaranteed is called the principal debtor. The person to whom the (debt is owed) (promise is made) (performance is due) is the creditor.

2. GUARANTOR, CREDITOR, PRINCIPAL DEBTOR. In this case, (*describe*) is the guarantor who agreed in writing to (answer) (be liable) (*describe*), to the creditor (*describe*), for the (debt) (promise) (performance) of the principal debtor (*describe*).

COMMENT

Because of the complexity of the terms "guarantor," "creditor," and "principal debtor," the court may wish to substitute proper names.

CV 509.03 Liability (New)

COMMENT

A contract of guaranty is, in general, governed by the law of contracts. Adapt the instructions in OJI–CV Chapter 501 to the issues in evidence.

1. GENERAL. The creditor claims that the principal debtor (*describe breach*) and that the guarantor must (answer) (pay) (*describe other obligation*) according to the contract of guaranty. Before you can find for the creditor, he must prove to you by the greater weight of the evidence that the principal debtor (*describe breach*).

2. DISPUTED TERMS. OJI-CV 501.03.

3. METHODS OF COMMUNICATION. OJI-CV 501.05.

4. CONSIDERATION. OJI-CV 501.03.

5. LANGUAGE. OJI-CV 501.07.

6. LATENT AMBIGUITY. OJI-CV 501.07.

CV 509.05 Affirmative defenses (New)

COMMENT

The guarantor has the burden of proving affirmative defenses by a preponderance of the evidence.

1. MISREPRESENTATION. The guarantor claims that he was wrongfully persuaded to sign the contract of guaranty by the misrepresentation(s) of the creditor on which he relied. Before you can find for the guarantor on this affirmative defense, he must prove to you by the greater weight of the evidence (a) that the creditor made the following representation(s): (*describe*), and (b) that the representation(s) was (were) false as the creditor knew or should have known, and (c) that the guarantor relied on the misrepresentation(s) and would not have (signed) (entered into) the contract of guaranty if he had known the truth.

COMMENT

If the principal debtor made the misrepresentation, the guarantor can set this up as a defense only if the creditor participated in the misrepresentation in some significant way.

52 Ohio Jurisprudence 3d (1997), Guaranty and Suretyship, Sections 151, 152; see *Silberman v. Natl. City Bank of Cleveland* (1930), 36 Ohio App. 442,

9 Ohio Law Abs. 248, 173 N.E. 16.

2. NOTICE OF DEFAULT SPECIFICALLY REQUIRED.

COMMENT

If notice of default by the principal debtor is required, failure to notify the guarantor is a defense; it may wholly discharge the guarantor under some circumstances, and under others, it may release the guarantor only to the extent of damages he suffered as a result of the failure. Without a specific provision for notice, the results of failure to notify cannot be standardized. If guarantor raises factual issues about this defense, the jury must be instructed. Generally, 38 American Jurisprudence 2d (1999), Guaranty, Sections 100-104; 52 Ohio Jurisprudence 3d (1997), Guaranty and Suretyship, Sections 84-86.

3. MODIFICATION. The guarantor claims that the underlying contract between the principal debtor and the creditor was (modified) (changed) (amended) in a material way by the two of them without the guarantor's consent, and that he was thereby released from all obligation to the creditor under the contract of guaranty. Before you can find for the guarantor on this affirmative defense, he must prove to you by the greater weight of the evidence (a) that the underlying contract was (modified) (changed) (amended) by the principal debtor and the creditor as follows: (*describe modification*), and (b) and this (modification) (change) (amendment) was material. If you so find, the guarantor is entitled to a verdict in his favor. On the other hand, the creditor is entitled to verdict in his favor, if you find that the evidence is balanced on these issues or if you find by the greater weight of the evidence that there was no (modification) (change) (amendment) or that although there was a (modification) (change) (amendment), it was not material.

OPTIONAL: AGREEMENT TO MODIFICATION. The creditor is entitled to a verdict in his favor if you find by the greater weight of the evidence that after the (modification) (change) (amendment) was made, the guarantor either agreed to it or again promised to answer for the (debt) (promise) (performance) of the principal debtor.

COMMENT

52 Ohio Jurisprudence 3d (1997), Guaranty and Suretyship, Sections 87-93; 38 American Jurisprudence 2d (1999), Guaranty, Section 82; see *Morgan v. Boyer* (1883), 39 Ohio St. 324.

In general, a modification is *material* if it changes the meaning or import of the guaranty and places the guarantor in a position different from that which he occupied before it was made. 74 American Jurisprudence 2d (1974), Suretyship, Section 43. If the materiality of the modification is a factual question, then

instruction must be given to the jury on this issue.

4. EXTENSION OF TIME. The guarantor claims that the creditor granted an extension of time to the principal debtor for (performance) (payment) required by the underlying contract (*describe*), and that therefore, the guarantor was released from the obligations of the contract of guaranty. Before you can find for the guarantor on this affirmative defense, he must prove to you by the greater weight of the evidence (a) that the creditor in fact extended the time (on) (within) which the principal debtor had to (pay) (perform) and (b) that this was done without the consent of the guarantor. If you so find, then the guarantor is entitled to a verdict in his favor. On the other hand, if you find that the evidence is balanced on this issue, or if you find by the greater weight of the evidence that there was no extension of time, then the creditor is entitled to a verdict in his favor.

OPTIONAL: AGREEMENT TO EXTENSION OF TIME. The creditor is entitled to a verdict in his favor if you find by the greater weight of the evidence that after the extension of time was granted, the guarantor either agreed to it or again promised to answer for the (debt) (promise) (performance) of the principal debtor.

COMMENT

Fithian v. Corwin (1866), 17 Ohio St. 118; *Rutherford v. Brachman* (1884), 40 Ohio St. 604; but see *Burnside Steel Foundry Co. v. General Metal Products Corp.* (1961), 115 Ohio App. 121, 20 O.O.2d 229, 184 N.E.2d 469.

5. WAIVER. OJI-CV 501.27.

6. ESTOPPEL. OJI-CV 501.31.

7. DURESS. OJI-CV 501.21.

8. PAYMENT OR PERFORMANCE. OJI-CV 501.23.

CV 509.07 Damages OJI-CV 501.33, OJI-CV 501.35

Chapter CV 513

SURETIES

CV 513.01	Liability of sureties on bond of agent
CV 513.03	Contract strictly construed
CV 513.05	Agreement to extend time
CV 513.07	Contribution
CV 513.09	Revival of liability

COMMENT

Contracts, see OJI-CV Chapter 501.

CV 513.01 Liability of sureties on bond of agent

If you find that W K T, at and before the time this bond was required of him, was intentionally and dishonestly a defaulter to the Adams Express Company, as to moneys intrusted to it, which he had received as its agent, and that the witness, D, acted for said company in demanding and receiving the bond, and, before receiving the same, either knew of such default, or if he did not know it, believed upon reasonable and reliable ground of information or belief, that such default existed, then, if suitable and reasonable opportunity existed, it was the duty of D, as the agent of the company, to make known to the defendants as sureties upon the bond such fact of W K T's delinquency, or D's belief of such delinquency, before accepting the bond, although D did not know before the bond was signed by the defendants as sureties who the sureties thereon were to be. And, as D did not give such information, if you find further the defendants, in signing the bond, acted under a belief from its recitals that the company considered W K T a trustworthy person, and would not have signed the bond but for such belief, then the plaintiff cannot recover against the sureties, or either of them.

But if W K T had not been a defaulter at the time of the acceptance of the bond by D, or if he had been, was so by mere mistake, or other cause not involving intentional wrong, and D, at the time aforesaid, knew or believed such delinquency existed, it was not the duty of D to make this knowledge or belief known to said sureties, or either of them, and his failure to do so would not vitiate the bond.

Or if D was, at the time of accepting the bond, at such a distance from the said sureties that, under the circumstances shown by the testimony, he could not reasonably inform them of such delinquency, he was not bound to give them this information, although W K T had been dishonestly a defaulter, and D knew or believed that fact, and his failure to do so would not vitiate the bond or prevent plaintiff from recovering upon it against the defendants.

COMMENT

Dinsmore v. Tidball (1878), 34 Ohio St. 411.

CV 513.03 Contract strictly construed

The law applies a strict construction to contracts of suretyship. If a creditor induces a surety to enter into a contract of suretyship by any fraudulent concealment of material facts, the surety will be thereby released. The contract of suretyship, as a general rule, is for the benefit of the creditor, while the surety derives no advantage from it. Hence the law imposes upon the creditor the duty of dealing with sureties, at every step, with the utmost good faith. It cannot always be said that the creditor before accepting sureties, is bound to inform them concerning information touching the business of the suretyship which may be within the knowledge of the creditor, and which might increase the risk of the undertaking on the part of the surety. This will depend upon the peculiar circumstances of the given case. If there is nothing in the circumstances surrounding the business of the suretyship to indicate that the sureties are being misled, or deceived, or that they are entering into the contract in ignorance of facts materially affecting the risks thereof, then the creditor in such case is under no obligation to communicate facts within his knowledge, but may assume that the sureties know the material facts or that they are willing to assume the risks of the undertaking if they sign the note.

But if the creditor knows, or has good grounds for believing that the sureties are being deceived or misled, and he believes that the sureties may not enter the relation and assume the obligation, if they become aware of material facts known to the creditor and the debtor, including their intent and purpose, that is the debtor and creditor, and the creditor has an opportunity before accepting the undertaking, to inform the sureties of such material fact, good faith and fair dealings demands in such case that the creditor should make such disclosures to them; and if he accepts the contract under such circumstances without doing so, the surety may avoid the same.

COMMENT

David Davies Packing Co. v. Trautman, Franklin County Common Pleas Court. Authorities on pre-existing debt, etc. *Fassnacht v. Emsing Gagen Co.* (1897), 18 Ind.App. 80, 46 N.E. 45; *Warren v. Branch* (1879), 15 W.Va. 21.

CV 513.05 Agreement to extend time

If V. was surety on the note and the time of payment was extended, then your verdict must be for the defendant. If V. was not a surety, your verdict must be for the plaintiff. As to what would be an extension of time that would discharge V., you will note that two things are required to be shown:

(1) It must be shown that W. and D. agreed that time for payment should be extended for some definite ascertained or ascertainable time.

(2) There must have been a consideration for such agreement.

It is claimed here that on January 28, 1858, D. paid $210, which was indorsed on the note in these words: "Received on this note two hundred and ten dollars, being two years' interest. January 28, 1858." This is not denied. Now, $210 would pay the interest on the note up to about April 20, 1858. Now, if, when this money was paid, it was agreed between W. and D. that time on the note should be extended to April 20, 1858, or to the time the $210 would pay the interest on the note. If it was then understood between them that the $210 was paid and received as interest then due and to become due on the note, then the time was extended, and V. would be discharged, if he was a surety on the note. If V. was a surety, then this case is decided when you ascertain what was the understanding between W. and D., when the money was paid. The indorsement on the note, to which I have referred, is in terms a receipt for two years' interest, as you will notice, and you will notice that two years' interest was not then due. If W. received this money and the indorsement on the note understanding it so, understanding that that D. had paid two years' interest, then W. could not collect his note till the two years had expired, and V. would be discharged from liability, if he was a surety.

COMMENT

Vore v. Woodford (1876), 29 Ohio St. 245.

CV 513.07 Contribution

That after a partnership firm has been doing business under a partnership name and has dissolved, when a bill of exchange is drawn by the whole or a part of the former members of said firm in their individual names, one as principal, the others as sureties, and another party, not having been a member of said firm, signs said bill as surety, said last signer is liable for contribution to the other sureties, without having knowledge of such dissolution brought home to him, whether having been a customer of said firm or not, the use of the firm name being necessary to raise the legal presumption that the bill was on partnership account.

If the jury finds that the drawers, others than the defendant of such bill of exchange had, prior to the drawing of the same, been partners, and that the firm had been accustomed to transact firm business of a like character in their individual names, which fact of so doing business was known to the defendant, by his having done similar business with said firm, then no liability was incurred by said defendant, to make contribution to the members of said firm signing as sureties, unless the defendant had actual notice of the dissolution of said firm, or that said plaintiff signed said bill as a surety.

COMMENT

Bain v. Wilson (1859), 10 Ohio St. 14. The judgment was reversed because there was no evidence to authorize the giving of the second paragraph of the charge.

CV 513.09 Revival of liability

If the defendant's testator, having been discharged from his liability as surety upon the note sued on in this action, with a full knowledge and understanding of his release as surety, promised the holder or payee to pay said note if the principal did not, he thereby revived his liability as surety, and that subsequent promise was binding without any new consideration to support it.

COMMENT

Bramble v. Ward (1883), 40 Ohio St. 267.

Chapter CV 517

UNIFORM COMMERCIAL CODE [SECURED TRANSACTIONS]

CV 517.01	Buyer in the ordinary course of business *[Rev. 2-24-07]*
CV 517.03	Description of collateral *[Rev. 2-24-07]*
CV 517.05	Enforceability of security interest *[Rev. 2-24-07]*
CV 517.07	Collateral in possession of secured party *[Rev. 2-24-07]*
CV 517.09	Perfection of security interest by possession *[Rev. 2-24-7]*
CV 517.11	Accessions *[Rev. 2-24-07]*
CV 517.13	Commingled and processed goods *[Rev. 2-24-07]*
CV 517.15	Right of secured party to take possession *[Rev. 2-24-07]*
CV 517.17	Disposition of collateral after default *[Rev. 2-24-07]*

COMMENT

Effective July 1, 2001, The Ohio General Assembly adopted substantial changes to Article 9 and related provisions of the Uniform Commercial Code. R.C. 1309.702 [U.C.C. § 9-702] provides that unless the revised Article 9 specifically provides otherwise, the revisions apply even if the transaction or lien was entered into prior to the effective date of the revisions. Consequently, there will rarely be a need to refer to the provisions of the prior Article 9 in drafting instructions.

CV 517.01 Buyer in the ordinary course of business R.C. 1301.01(I) [UCC § 1-201(9)] *[Rev. 2-24-07]*

1. GENERAL. (*Insert name of buyer*) claims that he/she is a buyer in the ordinary course of business. In order to find that (*insert name of buyer*) is a buyer in the ordinary course of business, you must find by the greater weight of the evidence that:

(A) he/she made the purchase in good faith and in the ordinary course of business; and

(B) he/she had no knowledge that the sale violated a third party's (ownership rights) (security interest) in (*describe goods*); and

(C) (*insert name of seller*) was in the business of selling goods of the kind sold to (*insert name of buyer*).

2. PARTIAL PAYMENT. A buyer will be considered to be a buyer if the buyer has paid all or part of the price of the goods.

COMMENT

Two of the basic rules of Article 9 are that, unless otherwise provided by Article 9, (1) a security agreement is effective between the parties and against purchasers and creditors, and (2) a security interest continues in the collateral notwithstanding disposition, unless disposition is authorized by the secured party. Under R.C. 1309.320(A) [UCC § 9-320(a)], however, a buyer in the ordinary course of business takes free of a security interest created by his seller even though the security interest is perfected and the buyer knows of its existence. Only if the buyer knows that the sale is "in violation" of the security interest will he lose this protection.

A transfer in bulk or as security for, or in partial or total satisfaction of, an antecedent debt does not constitute "buying" for the purpose of a "buyer in the ordinary course of business." R.C. 1301.01(I). Thus, if A (an art dealer) owes B $1000 and, in satisfaction of that debt, transfers a painting to B, B is not a buyer in the ordinary course of business. *Porter v. Wertz* (1979), 416 N.Y.S.2d 254, affirmed 53 N.Y.2d 696.

3. GOOD FAITH. "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing in the conduct or transaction concerned.

COMMENT

R.C. 1301.01(S) [UCC § 1-201(20)]. The 2001 revisions to Article 1 expanded the definition of "good faith" to include the observance of reasonable commercial standards of fair dealing in the conduct or transaction.

There are no statutory or case definitions of "reasonable commercial standards of fair dealing." What constitutes "reasonable commercial standards" depends on all the facts and circumstances in evidence.

4. KNOWLEDGE OF BUYER. The buyer has knowledge that the sale violated a third party's ownership rights or security interest only if the buyer had actual knowledge of that fact. It is not sufficient that the buyer had knowledge that the goods were subject to a third party's ownership rights or security interest; the buyer must actually know that the sale violated the ownership rights or security interest.

COMMENT

Because "actual knowledge" is required, reason to know that the sale is in violation of a security interest will not disqualify the buyer as a buyer in the ordinary course of business, nor will a purchase under these circumstances be in bad faith. See R.C. 1301.01(Y) [UCC § 1-202(b)]; *L.B. Folding Co., Inc. v. Gergel-Kellem Corp.* (1994), 94 Ohio App.3d 511; *Sohio Chemical Co. v. The*

Andersons (Nov. 14, 1986), Lucas App. No. CV 84-2531, 1986 Ohio App. LEXIS 9087.

5. BUSINESS OF SELLING. The seller is in the business of selling goods of the kind bought by the buyer if the seller has a routine practice of selling such goods. The sale of such goods does not have to be the seller's primary business.

COMMENT

The purchase of a computer from an electronics store or a refrigerator from an appliance store clearly falls within the business of the seller. On the other hand, the purchase of a large used machine from a manufacturer who has bought a replacement is not within the seller's business; such a buyer should expect to check for financing statements before the purchase. Cases are in some disagreement, but the second sentence of the instruction states what appears to be the proper rule. See *Textron Financial Corp. v. Medina Ready-Mix, Inc.*, (April 7, 1995), Richland App. NO. 94CA40, 1995 Ohio App. LEXIS 3645; *Tanbro Fabrics Corp. v. Deering Milliken, Inc.* (1976), 39 N.Y.2d 632; 4 White & Summers, Uniform Commercial Code (5 Ed. 2002), Section 33-8 at 314-316.

All persons selling minerals at the wellhead or minehead are deemed to be in the business of selling goods of that kind. R.C. 1301.01(I) [UCC § 1201(9)]. This is an exception to the general rule.

6. EXAMPLE (OPTIONAL). For example, a company whose primary business is renting cars but which routinely sells its used rental cars is in the business of selling automobiles.

7. SECURITY INTEREST. R.C. 1301.01 [UCC § 1-201(35)].

COMMENT

Generally, a "security interest" means an interest in personal property or fixtures that secures payment or performance of an obligation. However, additional language from the statute may be necessary under all the facts and circumstances in evidence.

CV 517.03 Description of collateral R.C. 1309.108 [UCC § 9-108] *[Rev. 2-24-07]*

1. GENERAL. (*Insert name of creditor*) claims a security interest in (*describe collateral*). To enforce this interest you must find by the greater weight of the evidence that (*describe collateral*) is reasonably identified in the security agreement. It is not necessary that this description be complete or specific so long as it reasonably

distinguishes (*describe collateral*) from any other property.

COMMENT

Drawn from R.C. 1309.108 [UCC § 9-108].

There are differences among the cases in other states as to whether the security agreement reasonably identified the collateral is a question of law or fact. The few Ohio cases dealing with the section have not dealt specifically with this issue.

For example, a description listing a specific number of hogs is sufficient for purposes of R.C. 1309.108 even if it does not specify whether the security interest is in specific hogs or in any hogs that were part of the debtor's herd. *Farmers State Bank & Trust Co. v. Mikesell* (1988), 51 Ohio App.3d 69.

2. SECURITY INTEREST. OJI-CV 517.01 § 7; R.C. 1301.01 [UCC § 1-201(35)].

3. SECURITY AGREEMENT. "Security agreement" means an agreement that creates or provides for a security interest.

COMMENT

R.C. 1309.102(A)(73) [UCC § 9-102(a)(73)].

CV 517.05 Enforceability of security interest R.C. 1309.203 [UCC § 9-203] *[Rev. 2-24-07]*

COMMENT

This instruction deals with the creation of an enforceable security interest. Unless the requirements of R.C. 1309.203 are met, no security interest is created in favor of the creditor, even as against the debtor. The requirements for the creation of a valid security interest differ slightly depending upon whether the creditor is in possession of the collateral. If the creditor is in possession of the collateral, a written security agreement signed by the debtor is not necessary; an oral security agreement will suffice.

Possession of the collateral is also important for purposes of determining priority among competing creditors (perfection). See R.C. 1309.301 and OJI-CV 517.09.

1. GENERAL. (*Insert name of creditor*) claims an enforceable security interest in (*describe collateral*).

2. ENFORCEABILITY—CREDITOR IN POSSESSION. To be an enforceable

security interest, you must find by the greater weight of the evidence that:

(A) (*insert name of creditor*) had possession of (*describe collateral*) pursuant to an oral or written security agreement with (*insert name of debtor*); and

(B) (*insert name of creditor*) gave value to (*insert name of debtor*) for the obligation covered by the security interest; and

(C) (*insert name of debtor*) had rights in the property at the time of the security agreement.

COMMENT

Drawn from R.C. 1309.203 [UCC § 9-203].

3. ENFORCEABILITY—CREDITOR NOT IN POSSESSION. To be an enforceable security interest, you must find by the greater weight of the evidence that:

(A) (*insert name of debtor*) (signed)(authenticated) a security agreement that contained a description of (*describe collateral*); and

(B) (*insert name of creditor*) gave value to (*insert name of debtor*) for the obligation covered by the security interest; and

(C) (*insert name of debtor*) had rights in the property at the time the security agreement was signed.

COMMENT

If the collateral is a certificated security (security represented by a certificate) or consists of deposit accounts, chattel paper, investment property, or letter-of-credit rights, different rules apply and instructions should be drafted with reference to R.C. § 1308.27 (certificated securities) or R.C. §§ 1309.104 to 1309.107.

4. SECURITY INTEREST. OJI-CV 517.01 § 7; R.C. 1301.01 [UCC § 1-201(35)].

5. VALUE. R.C. 1301.01 [UCC § 1-204].

6. SECURITY AGREEMENT. "Security agreement" means an agreement that creates or provides for a security interest.

COMMENT

R.C. 1309.102(A)(73) [UCC § 9-102(a)(73)].

Unless otherwise agreed, a security interest attaches at the time it becomes enforceable. Attachment is important to determine perfection and priority. See

R.C. 1309.203 [UCC § 9-203] and R.C. 1309.301 [UCC § 9-301].

7. DEBTOR. R.C. 1309.102(A)(28) [UCC § 9-102(a)(28)].

CV 517.07 Collateral in possession of secured party R.C. 1309.207 [UCC § 9-207] *[Rev. 2-24-07]*

1. GENERAL. (*Insert name of debtor*) claims that (*insert name of secured party*) is liable to (*insert name of debtor*) for loss caused by (*insert name of secured party*)'s:

(*Use appropriate alternative[s]*)

(A) failure to exercise reasonable care in the custody and preservation of (*describe collateral*) in his/her possession.

COMMENT

When the collateral consists of instruments or chattel paper, reasonable care includes taking any steps necessary to preserve rights against prior parties, unless the secured party and debtor have agreed to the contrary.

The definition of "chattel paper" has been expanded under the 2001 revisions to include records evidencing a monetary obligation and a security interest in specific goods and software used in goods. R.C. 1309.102(11) [UCC § 9-102(11)].

(*or*)

(B) failure to (apply any money received from [*describe collateral*] to the reduction of [*insert name of debtor*]'s obligation) (turn any money received from [*describe collateral*] over to [*insert name of debtor*]).

(*or*)

(C) failure to keep (*describe collateral*) identified unless it is fungible.

(*or*)

(D) repledging the (*describe collateral*) in such a way as to impair (*insert name of debtor*)'s right to redeem it.

COMMENT

The secured party may use or operate the collateral in order to preserve its value, pursuant to a court order, or in the manner and to the extent provided in the security agreement. R.C. 1309.207(B)(4) [UCC § 9-207(b)(4)]. Unless the debtor and secured party have agreed to the contrary, the debtor is liable to the secured party for reasonable expenses incurred in the custody, use or operation

of the collateral.

2. DEBTOR (ADDITIONAL). R.C. 1309.102(A)(28) [UCC § 9-102(a)(28)].

COMMENT

Whether a person is a "debtor" is rarely a factual or legal issue.

3. FUNGIBLE (ADDITIONAL). R.C. 1301.01 [UCC § 1-201(18)].

4. CONCLUSION. If you find by the greater weight of the evidence that (*insert name of secured party*) has failed to (*describe alleged failure*), you will further decide the amount of damages caused by this failure.

5. PROXIMATE CAUSE. OJI-CV Chapter 405.

6. DAMAGES. OJI-CV 501.33, OJI-CV 501.35.

COMMENT

The trial judge will have to modify these damages instructions to fit the particular duty breached in § (1)(A)-(D) above.

CV 517.09 Perfection of security interest by possession R.C. 1309.313 [UCC § 9-313] *[Rev. 2-24-7]*

COMMENT

Under R.C. 1309.313 [UCC § 9-313], a security interest may be perfected in goods, instruments, non-certificated securities (securities not covered by a certificate), negotiable documents, money, or chattel paper by possession of the collateral by the secured party. R.C. 1309.313 [UCC § 9-313] raises few jury issues other than whether the secured party had "possession" of the collateral. This instruction assumes the typical case: a priority claim has arisen between two parties; one is a secured party who claims perfection based on possession of the collateral; the other is an unsecured creditor, a competing secured creditor, a judgment lien creditor, a trustee in bankruptcy, or a purchaser.

1. GENERAL. You must decide by the greater weight of the evidence (whether [*insert name of secured party claiming possession*] or his/her agent had possession of the [*describe collateral*]) (when the possession of the [*describe collateral*] began).

2. POSSESSION. "Possession" means that (*insert name of secured party claiming possession*) or his/her agent had such control of the (*describe collateral*) that a third

party would not reasonably believe that the (*describe collateral*) was under the control of (*insert name of debtor*).

3. THIRD PARTIES (ADDITIONAL). If (*insert name of secured party claiming possession*) was in possession of (*describe collateral*) and then transferred (*describe collateral*) to a third party, you must decide by the greater weight of the evidence whether (*insert name of secured party claiming possession*)'s security interest remained perfected after the transfer.

4. REMAINED PERFECTED AFTER THE TRANSFER. "Remained perfected after the transfer" means that when (*insert name of secured party claiming possession*) delivered (*describe collateral*) to the third party, the (*describe collateral*) was accompanied by instructions to hold the (*describe collateral*) for the secured party or redeliver it to the secured party.

COMMENT

Drawn from R.C. § 1309.313 [U.C.C. § 9-313].

The essence of the test of possession under Article 9 is whether the secured party's control over the collateral is sufficient so that third parties will not be misled into believing that the collateral is free of a security interest. Some cases from other jurisdictions state that the possession must be "notorious," but this test should be rejected. See 4 White & Summers, Uniform Commercial Code (5 Ed. 2002), Section 31-8 at 147-156.

The security interest of a secured party in possession of collateral (other than certificated securities or goods covered by a document), will remain perfected by possession even if the secured party delivers the collateral to a third party, if the collateral is accompanied by instructions to hold it for the secured party or redelivery to the secured party. R.C. § 1309.313 [U.C.C. § 9-313].

For the purposes of this section, electronic chattel paper is a record or records consisting of information stored in an electronic medium. Perfection of a security interest is made by control or filing. R.C. 1309.105, R.C. 1309.312, R.C. 1309.314.

CV 517.11 Accessions R.C. 1309.335 [UCC § 9-335] *[Rev. 2-24-07]*

COMMENT

Most issues arising under R.C. 1309.335 are questions of law. The central question, however, of whether a good has become an accession is generally treated as a question of fact. See, e.g., *New Mexico v. Woodward* (1983), 100 N.M. 708; *Mack's Used Cars & Parts v. Tennessee Truck & Equip. Co.* (Tenn. App.1985), 694 S.W.2d 323; *In re Lyford* (Bkrptcy.Me.1982), 34 U.C.C.R. 754. Although courts sometimes speak of the parties' intention that collateral become an accession, it is clear that this intention is to be determined only from the

objective factors stated in the instruction.

1. GENERAL. The (*insert name of secured party claiming accession*) claims the (*describe collateral*) is an accession to (*describe goods to which collateral has been affixed*).

2. ACCESSION. "Accession" means that the (*describe collateral*) was installed or affixed to the (*describe goods to which collateral has been affixed*) so that it became a permanent part of the (*describe goods to which collateral has been affixed*). To decide whether the (*describe collateral*) is an accession, you must consider all the facts and circumstances in evidence including:

(A) the ease or difficulty of detaching the (*describe collateral*); and

(B) the degree of harm that detaching the (*describe collateral*) would cause to the (*describe goods to which the collateral has been affixed*); and

(C) the closeness of the relationship between the use of the (*describe collateral*) and the use of (*describe goods to which the collateral has been affixed*).

CV 517.13 Commingled and processed goods R.C. 1309.336 [UCC § 9-336] *[Rev. 2-24-07]*

COMMENT

Generally, the application of R.C. 1309.336 [UCC § 9-336] will involve only the application of relevant law to undisputed facts. However, a jury question may arise as to whether goods have become commingled. This instruction assumes an enforceable security interest and a financing statement which covers both the original and commingled goods.

1. GENERAL. (*Insert name of secured party*) claims that the (*describe original goods*) were commingled with the (*describe commingled goods*).

2. COMMINGLED. "Commingled" means that the (*describe original goods*) were (physically united) (processed, assembled or combined) so that their identity was lost in the (*describe commingled goods*). If the (*describe original goods*) have not lost their separate identity, then those goods were not commingled.

COMMENT

Drawn from R.C. 1309.336 [UCC § 9-336].

CV 517.15 Right of secured party to take possession R.C. 1309.609 [UCC § 9-609] *[Rev. 2-24-07]*

1. GENERAL. (*Insert name of debtor*) claims that (*insert name of secured party*)

breached the peace in taking possession of the (*describe collateral*). (*Insert name of secured party*) denies that a breach of peace occurred. You must decide whether a breach of the peace occurred.

2. BREACH OF THE PEACE. A "breach of the peace" occurs when there is any act of violence or an act likely to produce violence by others. It is not necessary that the act constituting a breach of the peace is itself a violation of the law.

COMMENT

Drawn from *Morris v. First National Bank & Trust Co. of Ravenna* (1970), 21 Ohio St.2d 25.

Courts have generally determined that a breach of the peace occurs as a matter of law upon the entry into a dwelling without consent. See *Kimble v. Universal TV Rental, Inc.* (1980), 65 Ohio Misc. 17.

The Ohio Retail Installment Sales Act contains limitations on the right of a secured party to take possession of the collateral following a default by a buyer in a consumer transaction. See R.C. 1317.07.

When a breach of the peace occurs, the typical remedy would be a common law action for conversion. Further remedies for failure to comply with Chapter 6 of Article 9, including failure to comply with R.C. 1309.609, are found in R.C. 1309.625.

CV 517.17 Disposition of collateral after default R.C. 1309.610 [UCC § 9-610] *[Rev. 2-24-07]*

COMMENT

R.C. 1309.610 [UCC § 9-610] requires that every aspect of a creditor's disposition of the collateral be commercially reasonable, including the seller's decision to sell at a public or private sale. Whether the disposition was commercially reasonable will normally be a question of fact. However, R.C. 1309.627 [UCC § 9-627] makes any disposition which has been approved in a judicial proceeding or by any bona fide creditor's committee or creditor's representative conclusively commercially reasonable. Also, this same section establishes that a sale is commercially reasonable if the collateral is sold in the usual manner in any recognized market or at the current price in such a market. The fact that a sale is made in such a market (e.g., dealer's auction) does not mean it is commercially unreasonable; it is simply not commercially reasonable as a matter of law.

If it is found not to be commercially reasonable, the effect of the creditor's failure to comply is provided in R.C. §§ 1309.625 and 1309.626 [U.C.C. §§ 9-625 and 9-626]. The creditor's failure to comply can also affect his ability to recover a deficiency from the debtor. See e.g., *Miles v. N.J. Motors Inc.*

(1975), 44 Ohio App.2d 351; *Huntington Nat'l Bank v. Stockwell* (1983), 10 Ohio App.3d 30. R.C. 1309.47(B).

Many consumer transactions will be governed by the Ohio Retail Installment Sales Act, R.C. 1317.07 et seq. which requires that disposition of the collateral be at a public sale, and establishes other criteria for default and disposition of collateral.

1. GENERAL. (*Insert name of secured party*) has lawfully taken possession of the (*describe collateral*) and has (resold) (leased) (*describe other disposition*) the (*describe collateral*) and applied the amount received to the debt owed by (*insert name of debtor*). However, all aspects of the (resale) (lease) (*describe other disposition*) must be commercially reasonable including the method, manner, time, place, and terms of the (resale) (lease) (*describe other disposition*). You must decide whether (*insert name of secured party*) acted in a commercially reasonable manner when the (*describe collateral*) was (resold) (leased) (*describe other disposition*). The mere fact that a better price could have been obtained by a (sale) (lease) (*describe other disposition*) at a different time or in a different (method) (manner) is not itself sufficient to establish that the sale was not commercially reasonable. The amount of the (resale price) (lease amount) is a factor which you may consider in deciding whether the sale was commercially reasonable. However, in deciding whether the sale was commercially reasonable, you should also consider all of the surrounding circumstances, including the publicity given to the sale, the number of possible purchasers contacted and the nature of the collateral.

2. COMMERCIALLY REASONABLE (ADDITIONAL). You shall find the (sale) (lease) (*describe other disposition*) was made in a commercially reasonable manner if

(*Use appropriate alternative[s]*)

(A) it was made in the usual manner on any recognized market.

(*or*)

(B) it was made for a price current in any recognized market at the time of disposition.

(*or*)

(C) it was made in conformity with reasonable commercial practices among dealers in the type of property that was subject to the disposition.

COMMENT

Drawn from R.C. § 1309.627 [UCC 9-627].

A recognized market is one in which standard prices are quoted, such as a stock or commodities exchange and does not include sales made at auto dealer's auctions or similar markets.

3. PURCHASE BY SECURED PARTY. A secured party's purchase of (*describe collateral*) is commercially reasonable only if the (*describe collateral*) was purchased at a

(*Use appropriate alternative[s]*)

(A) public disposition.

(or)

(B) private disposition, but only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

4. PUBLIC DISPOSITION. "Public disposition" means a disposition where the price of the (*describe collateral*) is determined after the public has had a meaningful opportunity for competitive bidding.

COMMENT

"Meaningful opportunity" is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition).

Drawn from Official Comment 7 to UCC 9-610.

5. NOTICE — NON-CONSUMER GOODS (ADDITIONAL). The law requires that a (*insert name of secured party*) send (*insert name of debtor*) (*insert name of secondary obligor*) (*insert name of other secured party*) reasonable notice of the time and place at which (*insert name of secured party*) intends to (sell) (lease) (*describe other disposition*) the collateral. You must decide whether (*insert name of secured party*) (gave) (sent) to (*insert name of debtor*) (*insert name of secondary obligor*) (*insert name of other secured party*) reasonable notice prior to the (sale) (lease) (*describe other disposition*) of the (*describe collateral*). You shall decide whether the notice was reasonable based on all of the facts and circumstances, but you must find the contents of the notice are reasonable if they:

(A) describe the debtor and the secured party; and

(B) describe the collateral; and

(C) state the method of intended disposition; and

(D) state that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and

(E) state the time and place reasonably describing the location of a public disposition or the time after which any other disposition will be made.

COMMENT

Drawn from R.C. 1309.613 [UCC 9-613].

Whether the required notice has been given and whether it was reasonable will generally be decided as matters of fact. However, R.C. § 1309.613 [UCC 9-613] provides that if the five criteria above are met the notice will be reasonable as a matter of law. If, however, the collateral (1) is perishable, (2) threatens to decline speedily in value, or (3) is of a type customarily sold on a recognized market, notice is not required. Whether these exceptions apply will normally be decided as a matter of law.

R.C. 1309.611(C) only requires that the creditor "send" notice to the debtor. Where the creditor claims notice was sent, but the debtor denies receipt, the judge's instruction should make clear that so long as the creditor sent the notice in a manner which satisfied R.C. 1301.01 (LL) [UCC § 1-201(36)], the fact that the debtor did not receive the notice is irrelevant.

For the purposes of disposition, secured parties are now required to give notification of a disposition of collateral to other secured parties and those lienholders that have filed financing statements against the debtor covering the collateral. R.C. 1309.611.

6. NOTICE - CONSUMER GOODS (ADDITIONAL). The law requires that a (*insert name of secured party*) send (*insert name of debtor*) (*insert name of secondary obligor*) reasonable notice of the time and place at which (*insert name of secured party*) intends to (sell) (lease) (*describe other disposition*) the collateral. You must decide whether (*insert name of secured party*) sent (*insert name of debtor*) reasonable notice prior to the (sale) (lease) (*describe other disposition*) of the (*describe collateral*). To be reasonable the notice must at least:

(A) describe the debtor and the secured party; and

(B) describe the collateral; and

(C) state the method of intended disposition; and

(D) state that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and

(E) state the time and place reasonably describing the location of a public disposition or the time after which any other disposition will be made; and

(F) describe any liability for a deficiency of the person to whom the notification is sent; and

(G) contain a telephone number from which the amount that must be paid to the secured party to redeem the collateral is available; and

(H) contain a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

Even if you find all these factors, you must further decide from all facts and circumstances in evidence whether the notice was reasonable.

COMMENT

Drawn from R.C. 1309.614 [UCC 9-614].

Regardless of whether a secured party's disposition of collateral after default by the debtor is commercially reasonable, where the collateral is consumer goods, the debtor may recover the statutory award pursuant to R.C. 1309.625 if the secured party fails to provide the debtor with reasonable notice of the sale of the collateral. *Kruse v. Voyager Ins. Cos.* (1995), 72 Ohio St.3d 192, 1995 Ohio 120.

For the purposes of disposition, secured parties are now required to give notification of a disposition of collateral to other secured parties and those lienholders that have filed financing statements against the debtor covering the collateral. R.C. 1309.611.

7. RECOGNIZED MARKET. "Recognized market" means one in which standard prices are quoted, such as stock or commodities exchanges, and does not include sales made at auto dealer's auctions or similar markets.

8. COLLATERAL. R.C. 1309.102(A)(12).

9. DEBTOR. R.C. 1309.102(A)(28).

10. SEND. R.C. 1301.01.

Chapter CV 521

CONSUMER SALES PRACTICES ACT

CV 521.01	Consumer Sales Practices Act — R.C. 1345.01-1345.13 *[Rev. 12-1-07]*
CV 521.03	Consumer Sales Practices Act: illegal rebates or discounts R.C. 1345.01-1345.02(D) *[Rev. 12-1-07]*

CV 521.01 Consumer Sales Practices Act — R.C. 1345.01-1345.13 *[Rev. 12-1-07]*

COMMENT

See OJI-CV 521.03 for conduct R.C. 1345.02(D).

Instructions for violations of R.C. 1345.02(E) dealing with certain natural gas or public telecommunications transactions rarely result in jury issues.

Instructions for sections of Chapter 1345 dealing with Ohio Homebuyers' Protection Act (predatory lending) are not included.

1. GENERAL. The plaintiff claims that the defendant(s) (has) (have) violated the Ohio Consumer Sales Practices Act. The Ohio Consumer Sales Practices Act prohibits unfair, deceptive, or unconscionable acts or practices in connection with a consumer transaction.

2. CLAIM. In order to find that the defendant(s) (has) (have) violated the Consumer Sales Practices Act, you must find by the greater weight of the evidence that the defendant(s) *(insert act alleged to violate CSPA)* and that this (act) (practice) was (unfair) (deceptive) (unconscionable).

COMMENT

For the Ohio Consumer Sales Practices Act to apply, one party to a transaction must be a "consumer," the other party must be a "supplier," and the transaction must be a "consumer transaction." Normally, the applicability of the statute will be a question of law. If the facts relating to the applicability of the statute are in dispute, the judge should draft appropriate instructions based upon the definitions contained in R.C. 1345.01.

Numerous decisions have said that the Ohio Consumer Sales Practices Act is a remedial statute and should be liberally construed to protect consumers. See

Einhorn v. Ford Motor Co. (1990), Ohio St.3d 27.

3. UNFAIR. An act or practice is "unfair" if it is characterized by (injustice) (partiality) (bias) (deception) (inequitable business dealings).

COMMENT

Drawn from *Walker v. Dominion Homes*, 164 Ohio App.3d 385, 2005-Ohio-6055; *Saraf v. Maronda Homes, Inc.*, Franklin App. No. 02AP-461, 2002-Ohio-6741.

4. DECEPTIVE.

(A) GENERAL. An act or practice is "deceptive" if it is likely to create a belief in the mind of the consumer that is not (in accord) (consistent) with the facts.

COMMENT

Drawn from *Frey v. Vin Devers, Inc.*, (1992), 80 Ohio App.3d 1.

An act or practice may include an omission. *Walker v. Dominion Homes*, 164 Ohio App.3d 385, 2005-Ohio-6055.

(B) DECEPTIVE ACTS PER SE (ADDITIONAL). If you find by the greater weight of the evidence that the defendant(s)

(Use appropriate alternative(s))

(1) (has) (have) represented that the (*specify subject of the consumer transaction*) has (sponsorship) (approval) (performance characteristics) (accessories) (uses) (benefits) that it does not have;

(or)

(2) (has) (have) represented that the (*specify subject of the consumer transaction*) is of a particular (standard) (quality) (grade) (style) (prescription) (model), if it is not;

(or)

(3) (has) (have) represented that the (*specify subject of the consumer transaction*) is new, or unused, if it is not;

(or)

(4) (has) (have) represented that the (*specify subject of the consumer transaction*) is available to the consumer for a reason that does not exist;

(or)

(5) (has) (have) represented that the (*specify subject of the consumer transaction*) has been supplied in accordance with a previous representation, if it has not; unless the supplier has furnished similar merchandise of equal or greater value as a good faith substitute;

(or)

(6) (has) (have) represented that the (*specify subject of the consumer transaction*) will be supplied in greater quantity than the supplier intends;

(or)

(7) (has) (have) represented that (replacement) (repair) is needed, if it is not;

(or)

(8) (has) (have) represented that a specific price advantage exists, if it does not;

(or)

(9) (has) (have) represented that the supplier has a (sponsorship) (approval) (affiliation) that the supplier does not have;

(or)

(10) (has) (have) represented that (*specify subject of the consumer transaction*) involves or does not involve a/an (warranty) (disclaimer of warranties) (right) (remedy) (obligation) if the representation is false;

(or)

(11) (*list unfair or deceptive acts or practices established by O.A.C. Chapter 109:4-3*),

you must find that the defendant(s) (has) (have) committed a deceptive act.

COMMENT

Drawn from R.C. 1345.02.

5. UNCONSCIONABLE. An act or practice is "unconscionable" if it is (unscrupulous) (outrageous) (offensive to the public conscience).

COMMENT

Drawn from *Slagle Farms, Inc. v. Int'l Harvester Co.* (May 10, 1979), 3d Dist. No. 3-79-2. Contracts of adhesion are not "unconscionable" per se. *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826.

In deciding whether an act or practice committed by the defendant(s) is unconscionable, you shall consider the following factors:

(A) whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect his/her interests because of his/her physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of the agreement;

(B) whether the supplier knew at the time the consumer transaction was being entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers;

(C) whether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;

(D) whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer;

(E) whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier;

(F) whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to his/her detriment; and

(G) (ADDITIONAL) whether the supplier has, without justification, refused to make a refund in cash or by check for a returned item that was purchased with cash or by check, unless the supplier had conspicuously posted in the establishment at the time of the sale a sign stating the supplier's refund policy.

You may consider other circumstances in evidence tending to show whether an act or practice is unconscionable.

COMMENT

Drawn from R.C. 1345.03.

The Committee believes that both the presence and the absence of the factors listed in (A)–(F) are relevant to whether an act or practice is unconscionable. Therefore, the judge should read those factors to the jury, regardless of whether evidence of them has been presented. The factor listed in (G) above should be read only if raised by the evidence.

It is not clear from the statute or the case law whether the determination of unconscionability under the CSPA is a question of fact or a question of law. Notwithstanding the fact that no reported Ohio case directly addresses the question, the Committee believes that the CSPA allows the jury to determine whether an act or practice is unconscionable. It recognizes that this treatment is not consistent with the manner in which the Uniform Commercial Code treats

the unconscionability of a contract or contract clause. The CSPA, unlike the UCC, is not limited to contracts; it regulates all "acts and practices" of suppliers. The interpretation and enforceability of contracts has traditionally been a province of the court, therefore the UCC's treats unconscionability of contracts as a matter of law. The Committee believes, however, that the jury is the appropriate body to determine whether an act or practice is unconscionable under the CSPA primarily because at its essence unconscionability is a reflection of the community's conscience and values. [SLL1]In addition, because determinations of unconscionability are so fact-specific, often turning on such things as education, language ability, and available alternatives, juries are in the best position to evaluate these factors.

6. KNOWLEDGE OR INTENT NOT NECESSARY. In order for the defendant(s) to commit a/an (unfair) (deceptive) act, it is not necessary for the defendant(s) to intend to deceive the plaintiff or to know that the act or practice was (unfair) (deceptive) (in violation of law).

COMMENT

Drawn from *Wall v. Planet Ford*, 159 Ohio App.3d 840, 2005-Ohio-1207; *Mannix v. DCB Service, Inc.*, Montgomery App. No. 19910, 2004-Ohio-6672; *Howard v. Norman's Auto Sales*, 10th Dist. No. 02AP-1001, 2003-Ohio-2834; *Funk v. Montgomery AMC/Jeep/Renault* (1990), 66 Ohio App.3d 815.

7. KNOWINGLY. 4 OJI 409.11.

8. SUBSTANTIAL COMPLIANCE (ADDITIONAL). It is not a defense to a claim under the Consumer Sales Practices Act that the defendant(s) (has) (have) substantially complied with the law or that complete compliance is impossible.

COMMENT

Drawn from *Martin v. Bullinger* (1988), 43 Ohio App.3d 136; *Brown v. Deacon Chrysler Plymouth* (1979), 14 Ohio Op.3d 436.

9. DAMAGES. If you find for the plaintiff, you will decide an amount of money that will reasonably compensate the plaintiff for the actual loss he/she sustained as the natural and probable consequence of the (defendant's) (defendants') violation. The amount awarded may include a reasonable sum to compensate the plaintiff for mental anguish or emotional distress you find were actually suffered by the plaintiff as a consequence of the (defendant's) (defendants') violation.

COMMENT

Drawn from *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481. In *Whitaker*, the Ohio Supreme Court held that non-economic damages, including damages for mental distress, were recoverable under the Consumer Sales Practices Act. The Court also held that non-economic damages were subject to trebling under R.C. 1345.09 under the same circumstances as economic damages.

10. BONA FIDE ERROR (ADDITIONAL). If you find for the plaintiff and award damages, you shall then decide whether the act or practice resulted from a bona fide error. "Bona fide". means that the action was taken in good faith, with honesty and sincerity, and without fraud or deceit. To find a bona fide error, you must find by the greater weight of the evidence that the violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error.

COMMENT

R.C. 1345.11(A); *Andrews v. Scott Pontiac Cadillac GMC, Inc.* (1991), 71 Ohio App.3d 613. The existence of a bona fide error does not prevent the award of actual damages to the plaintiff that result from a violation of the act. The presence of a bona fide error prevents, however, the award of attorney fees or civil penalties, which are awarded by the judge, not the jury. When the existence of a bona fide error is at issue in the case, the judge should provide the jury with a separate interrogatory on bona fide error.

11. ACT COMMITTED KNOWINGLY. If you find that the defendant(s) (has) (have) committed an unfair or deceptive act or practice, you will also decide whether the defendant(s) acted knowingly. To find that an act or practice was committed knowingly, you must find that the defendant(s) had actual knowledge that he/she/it/they (was) (were) engaging in the act or practice; however, it is not necessary that the defendant(s) knew that the act or practice violated the law.

COMMENT

Einhorn v. Ford Motor Co. (1990), 48 Ohio St.3d 27. Whether an act or practice was committed "knowingly" can have a number of consequences under the Consumer Sales Practices Act. Many of the circumstances to be taken into account in deciding whether an act or practice is unconscionable require that the act or practice be done knowingly. Further, in order to recover attorney fees under R.C. 1345.09, a consumer must prove that a supplier committed an act or practice knowingly.

12. KNOWLEDGE OF POLICIES AND PROCEDURES (ADDITIONAL). A supplier is presumed to have knowledge of his/her/its policies and procedures and the language contained in his/her/its preprinted literature and advertising.

COMMENT

Karst v. Goldberg (1993), 88 Ohio App.3d 413; *State ex rel Celebrezze v. Ferraro* (1989), 63 Ohio App.3d 168.

13. KNOWLEDGE OF EMPLOYEE OR AGENT (ADDITIONAL). Knowledge obtained by an employee or agent (within the scope of his/her employment) (while he/she is working) becomes the knowledge of the employer even if the employee or agent never communicated it to the employer.

COMMENT

Drawn from *State ex rel Nicodemus v. Industrial Comm.* (1983), 5 Ohio St.3d 58; *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Services, Inc.* (1992), 81 Ohio App.3d 591.

CV 521.03 Consumer Sales Practices Act: illegal rebates or discounts R.C. 1345.01-1345.02(D) *[Rev. 12-1-07]*

1. GENERAL. The plaintiff claims that the defendant(s) (has) (have) violated the Ohio Consumer Sales Practices Act by (offering) (representing) to the plaintiff that he/she would receive a (rebate) (discount) (*describe other benefit*) not permitted by the Act.

2. CLAIM. In order to find that the defendant(s) (has) (have) violated the Consumer Sales Practices Act, you must find by the greater weight of the evidence that

(A) the defendant(s) (has) (have) (offered) (represented) to the plaintiff that he/she would receive a (rebate) (discount) (*describe other benefit*); and

(B) the (rebate) (discount) (*describe other benefit*) was (offered) (represented) as an inducement for entering into (*describe consumer transaction*); and

(C) the (rebate) (discount) (*describe other benefit*) was (offered) (represented) in return for (giving the defendant[s] the names of prospective consumers) (helping the defendant[s] to enter into [*describe other consumer transactions*]); and

(D) the (rebate) (discount) (*describe other benefit*) was contingent upon (*describe event that occurred after the consumer entered into the transaction*).

COMMENT

"Consumer transaction" is defined in R.C. 1345.01.

3. DAMAGES. If you find for the plaintiff, you will decide an amount of money that will reasonably compensate the plaintiff for the actual loss he/she sustained as the natural and probable consequence of the defendant's violation. The amount awarded may include a reasonable sum to compensate the plaintiff for mental anguish or emotional distress that you find were actually suffered by the plaintiff as a consequence of the (defendant's) (defendants') violation.

COMMENT

Drawn from *Whitaker v. M.T. Automotive, Inc.* 111 Ohio St.3d 177, 2006-Ohio-5481. In *Whitaker*, the Ohio Supreme Court held that non-economic damages, including damages for mental distress, were recoverable under the Consumer Sales Practices Act. The Court also held that non-economic damages were subject to trebling under R.C. 1345.09 under the same circumstances as economic damages.

4. SUBSTANTIAL COMPLIANCE (ADDITIONAL). It is not a defense to a claim under the Consumer Sales Practices Act that the defendant(s) (has) (have) substantially complied with the law or that complete compliance is impossible.

COMMENT

Drawn from *Martin v. Bullinger* (1988), 43 Ohio App.3d 136; *Brown v. Deacon Chrysler Plymouth* (1979), 14 Ohio Op.3d 436.

5. BONA FIDE ERROR (ADDITIONAL). If you find for the plaintiff and award damages, you shall then decide whether the act or practice resulted from a bona fide error. "Bona fide" means that the action was taken in good faith, with honesty and sincerity, and without fraud or deceit. To find a bona fide error, you must find by the greater weight of the evidence that the violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error.

COMMENT

R.C. 1345.11(A); *Andrews v. Scott Pontiac Cadillac GMC, Inc.* (1991), 71 Ohio App.3d 613. The existence of a bona fide error does not prevent the award of actual damages to the plaintiff that result from a violation of the act. The presence of a bona fide error prevents, however, the award of attorney fees or civil penalties, which are awarded by the judge, not the jury. When the existence

of a bona fide error is at issue in the case, the judge should provide the jury with a separate interrogatory on bona fide error.

6. ACT COMMITTED KNOWINGLY. If you find that the defendant(s) (has) (have) committed an unfair or deceptive act or practice, you will also decide whether the defendant(s) acted knowingly. To find that an act or practice was committed knowingly, you must find that the defendant(s) had actual knowledge that he/she/it/they (was) (were) engaging in the act or practice; however, it is not necessary that the defendant(s) knew that the act or practice violated the law.

COMMENT

Drawn from *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27. Whether an act or practice was committed "knowingly" can have a number of consequences under the Consumer Sales Practices Act. Many of the circumstances to be taken into account in deciding whether an act or practice is unconscionable require that the act or practice be done knowingly. Further, in order to recover attorney fees under R.C. 1345.09, a consumer must prove that a supplier committed an act or practice knowingly.

7. KNOWINGLY. 4 OJI 409.11.

8. KNOWLEDGE OF POLICIES AND PROCEDURES (ADDITIONAL). A supplier is presumed to have knowledge of his/her/its policies and procedures and the language contained in his/her/its preprinted literature and advertising.

COMMENT

Karst v. Goldberg (1993), 88 Ohio App.3d 413; *State ex rel Celebrezze v. Ferraro* (1989), 63 Ohio App.3d 168.

9. KNOWLEDGE OF EMPLOYEE OR AGENT (ADDITIONAL). Knowledge obtained by an employee or agent (within the scope of his/her employment) (while he/she is working) becomes the knowledge of the employer even if the employee or agent never communicated it to the employer.

COMMENT

Drawn from *State ex rel Nicodemus v. Industrial Comm.* (1983), 5 Ohio St.3d 58; *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Services, Inc.* (1992), 81 Ohio App.3d 591.

(Rcl.08S2CIV–11/2008 Pub.4346)

Chapter CV 525

RESIDENTIAL LENDING PRACTICES

CV 525.01	Certificate of registration to act as mortgage broker; license to act as loan officer; exemptions R.C. 1322.02 *[Rev. 10-11-08]*
CV 525.03	Failure to provide required information R.C. 1322.062 *[Rev. 10-11-08]*
CV 525.05	Failure of a registrant to deliver tax and payment disclosures R.C. 1322.063 *[Rev. 10-11-08]*
CV 525.07	Failure to provide timely disclosure of material changes in terms R.C. 1322.064 *[Rev. 10-11-08]*
CV 525.09	Prohibited conduct R.C. 1322.07 *[Rev. 10-11-08]*
CV 525.11	Document retention, fee premiums, referral fees, and kickbacks R.C. 1322.071 *[Rev. 10-11-08]*
CV 525.13	Improper payment of fees to a mortgage broker R.C. 1322.08 *[Rev. 10-16-08]*
CV 525.15	Unlawful lending practices by a loan officer or mortgage broker R.C. 1322.081 *[Rev. 10-16-08]*
CV 525.17	Failure to include registration number on advertisements R.C. 1322.09 *[Rev. 10-16-08]*
CV 525.19	Damages R.C. 1322.11 *[Rev. 10-16-08]*
CV 525.21	Violations by title insurance agents R.C. 3953.35 *[Rev. 10-16-08]*
CV 525.23	Unconscionable acts in connection with residential mortgages R.C. 1345.031 *[Rev. 10-11-08]*

COMMENT

In certain cases S.B. 185 effective January 1, 2007, contains exemptions that are dealt with in this Chapter through comments. These exemptions will rarely involve issues for the jury. With respect to any exemption, however, the person claiming the exemption has the burden of proof of establishing an exemption. R.C. 1322.11. Although the statute does not provide the standard of proof, the Committee believes that preponderance of the evidence is the appropriate standard.

CV 525.01 Certificate of registration to act as mortgage broker; license to act as loan officer; exemptions R.C. 1322.02 *[Rev. 10-11-08]*

1. GENERAL. The plaintiff claims that the defendant acted as a (mortgage broker)

(loan officer) without legal authorization.

2. CLAIM. In order to find that the defendant acted without legal authorization, you must find by the greater weight of the evidence that the defendant

(*Use appropriate alternative[s]*)

(A) acted, on his/her/its own behalf or on behalf of another, as a mortgage broker without first obtaining a certificate of registration from the superintendent of financial institutions for every office he/she/it maintained for transacting business as a mortgage broker.

(*or*)

(B) acted as a mortgage broker or held himself/herself/itself out as a mortgage broker under the authority or name of another (registrant) (exempt person) without first obtaining a certificate of registration from the superintendent of financial institutions for every office he/she/it maintained for transacting business as a mortgage broker.

(*or*)

(C) acted, on his/her own behalf or on behalf of another, as a loan officer without obtaining a license from the superintendent of financial institutions.

(*or*)

(D) was employed as a loan officer by more than one mortgage broker at a time.

3. MORTGAGE BROKER. R.C. 1322.01.

4. LOAN OFFICER. "Loan officer" means an employee who originates mortgage loans in consideration of direct or indirect gain, profit, fees, or charges. "Loan officer" also includes an employee who solicits financial and mortgage information from the public for sale to another mortgage broker.

COMMENT

R.C. 1322.01.

5. REGISTRANT. "Registrant" means a person who has obtained a certificate from the superintendent of financial institutions for the transaction of business as a mortgage broker.

COMMENT

Drawn from R.C. 1322.01 and .02.

6. EXEMPT PERSON. R.C. 1322.02(C)(1).

COMMENT

The list of exemptions contained in R.C. 1322.02(C)(1) is lengthy and it incorporates provisions of other statutes. The exemptions will rarely present issues of fact for the jury. If it is necessary to define an exempt person for the jury, the judge can select the relevant portion of R.C. 1322.02(C)(1) and craft an appropriate instruction.

7. DAMAGES. OJI-CV 525.19.

CV 525.03 Failure to provide required information R.C. 1322.062 ***[Rev. 10-11-08]***

1. GENERAL. The plaintiff claims that the defendant, a registrant, failed to provide information required by law.

2. CLAIM. In order to find for the plaintiff, you must find by the greater weight of the evidence that the defendant failed to deliver

(*Use appropriate alternative[s]*)

(A) to the plaintiff a (mortgage loan origination disclosure statement within three business days after taking a loan application from the plaintiff) (revised mortgage loan origination disclosure statement not later than twenty-four hours after a change in the information provided in the mortgage loan origination disclosure statement).

COMMENT

For a mortgage loan origination disclosure statement or a revised mortgage loan origination disclosure statement to comply with R.C. 1322.062, it must include the specific requirements enumerated in that section. These requirements are lengthy and detailed and rarely, if ever, will questions of fact arise as to whether a disclosure statement contained the required components. This instruction has been drafted for use when the issue is whether the disclosure statement was delivered to the plaintiff. If there is a question of fact as to whether the disclosure statement contained an item required by R.C. 1322.062, the judge should include appropriate instructions.

(*or*)

(B) to the lender a copy of the mortgage loan disclosure statement.

COMMENT

This instruction (B) only applies when the loan is a "covered loan" as defined

in R.C. 1349.25(D).

(*or*)

(C) to the plaintiff, immediately upon receipt, a copy of any nonproprietary or publicly available credit score and report regarding the plaintiff obtained by the defendant for the purpose of the mortgage loan application.

(*or*)

(D) to the plaintiff a copy of the automated validation model report.

COMMENT

This instruction (D) only applies if the loan officer or mortgage broker used an automated validation model to determine an appraisal report.

(*or*)

(E) to the plaintiff a good faith estimate of the cost of the loan that discloses the amount of, or range of, charges for the specific settlement services the plaintiff is likely to incur in connection with the mortgage loan at the same time that the defendant delivers the mortgage loan origination disclosure statement.

COMMENT

For a good faith estimate of the cost of the loan to comply with this section, it must comply with the requirements of the Real Estate Settlements Procedures Act (RESPA) and the additional disclosure requirements contained in R.C. 1322.06(D). These requirements are lengthy and detailed and rarely, if ever, will questions of fact arise as to whether a good faith estimate contained the required components. This instruction has been drafted for use when the issue is whether the good faith estimate was delivered to the buyer. If there is a question of fact as to whether the good faith estimate contained an item required by RESPA or R.C. 1322.06(D), the judge should include appropriate instructions.

3. MORTGAGE BROKER. R.C. 1322.01.

4. REGISTRANT. "Registrant" means a person who has obtained a certificate from the superintendent of financial institutions for the transaction of business as a mortgage broker.

COMMENT

Drawn from R.C. 1322.01 and .02.

5. BONA FIDE THIRD PARTY. "Bona fide third party" means a person that is not an employee of, related to, or affiliated with, the registrant, and who is not used for the purpose of circumvention or evasion of this section.

COMMENT

Drawn from R.C. 1322.08(D)(1).

6. DAMAGES. OJI-CV 525.19.

CV 525.05 Failure of a registrant to deliver tax and payment disclosures R.C. 1322.063 ***[Rev. 10-11-08]***

1. GENERAL. The plaintiff claims that the defendant failed to deliver to the plaintiff (an escrow statement) (a description of the plaintiff's regular monthly payment) as required by law.

2. CLAIM. In order to find that the defendant has failed to deliver (an escrow statement) (a description of the plaintiff's regular monthly payment), you must find by the greater weight of the evidence that the defendant failed to deliver not later than twenty-four hours before the loan to the plaintiff was closed:

(A) a statement indicating whether property taxes will be escrowed; and

(B) a description of what is covered by the regular monthly payment, including principal, interest, taxes, and insurance, as applicable.

3. DAMAGES. OJI-CV 525.19.

CV 525.07 Failure to provide timely disclosure of material changes in terms R.C. 1322.064 ***[Rev. 10-11-08]***

1. GENERAL. The plaintiff claims that the defendant failed to provide the plaintiff with notice of material change(s) in the terms of the plaintiff's loan as required by law.

2. CLAIM. In order to find that the defendant failed to provide the plaintiff with notice of material change(s) in the terms of the plaintiff's loan, you must find by the greater weight of the evidence that the defendant failed to

(Use appropriate alternative[s])

(A) timely inform the plaintiff

(Use appropriate alternative[s])

(1) of a change in the type of loan being offered, such as a fixed or variable rate loan or a loan with a balloon payment.

(*or*)

(2) of a change in the term of the loan, as reflected in the number of monthly payments due before a final payment is scheduled to be made.

(*or*)

(3) of a change in the interest rate of more than 0.15%.

(*or*)

(4) of a change in the regular monthly payment of principal and interest of more than five per cent.

(*or*)

(5) of a change regarding the escrow of taxes or insurance.

(*or*)

(6) of a change regarding the payment of private mortgage insurance.

(*or*)

(B) timely inform the plaintiff if any fees payable by the plaintiff to the defendant or lender increased by more than ten per cent or one hundred dollars, whichever is greater.

3. TIMELY. A disclosure is timely if the defendant provides the plaintiff with the revised information no later than twenty-four hours after the change occurs, or twenty-four hours before the loan is closed, whichever is earlier.

COMMENT

Drawn from R.C. 1322.064(B).

4. DAMAGES. OJI-CV 525.19.

COMMENT

For a violation of R.C. 1322.064, the defendant, in addition to paying other damages, must refund to the buyer the amount by which any fees payable to the defendant or lender were increased. If the fees were financed into the loan, the defendant must also pay to the buyer the interest that would accrue over the term of the loan on that excess amount. R.C. 1322.064(C).

CV 525.09 Prohibited conduct R.C. 1322.07 *[Rev. 10-11-08]*

1. GENERAL. The plaintiff claims that the defendant engaged in certain acts and

practices as (a mortgage broker) (a registrant) (a licensee) (an applicant for a certificate of registration or license) that are prohibited by law.

2. CLAIM. In order to find that the defendant violated the law, you must find by the greater weight of the evidence that the defendant, as (a mortgage broker) (a registrant) (a licensee) (an applicant for a certificate of registration or license),

(*Use appropriate alternative[s]*)

(A)(1) obtained a certificate of registration or license through (any false or fraudulent representation of a material fact) (any omission of a material fact required to be disclosed [*insert applicable Ohio law*]).

(*or*)

(A)(2) made any substantial misrepresentation in any registration or license application.

(*or*)

(B) (made false or misleading statements of a material fact) (omitted statements required to be disclosed by [*insert applicable Ohio law*]) (made false promises regarding a material fact) through advertising or other means, or engaged in a continued course of misrepresentations.

(*or*)

(C) engaged in improper, fraudulent, or dishonest dealings.

(*or*)

(D) failed to notify the division of financial institutions within thirty days after the (registrant) (licensee) (applicant), in a court of competent jurisdiction of this state or any other state, was convicted of or pled guilty to any criminal offense involving (theft) (receiving stolen property) (embezzlement) (forgery) (fraud) (passing bad checks) (money laundering) (drug trafficking) (*insert other criminal offense involving money or securities*).

(*or*)

(E) knowingly (made) (proposed) (solicited) fraudulent, false, or misleading statements on any mortgage document or on any document related to a mortgage, including a mortgage application, real estate appraisal, or real estate settlement or closing document. For purposes of this paragraph, "fraudulent, false, or misleading statements" do not include mathematical errors, inadvertent transposition of numbers, typographical errors, or any other bona fide error.

COMMENT

For helpful definitions of "bona fide error" see R.C 1345.11 and 1349.30.

(*or*)

(F) knowingly (instructed) (solicited) (proposed) (caused) the (plaintiff) (buyer) to sign in blank a mortgage related document.

COMMENT

In a rare case, the plaintiff may not be the person who signed the mortgage related document in blank. For example, a case in which a co-borrower plaintiff relied upon a document signed in blank by another co-borrower.

(*or*)

(G) knowingly (compensated) (instructed) (induced) (coerced) (intimidated) or attempted to (compensate) (instruct) (induce) (coerce) (intimidate) a licensed or certified real estate appraiser for the purpose of corrupting or improperly influencing the independent judgment of the real estate appraiser with respect to the value of the dwelling offered as security for repayment of a mortgage loan;

(*or*)

(H) promised to refinance a loan for the plaintiff in the future at a lower interest rate or with more favorable terms, unless the promise was set forth in writing and was initialed by the plaintiff.

3. MORTGAGE BROKER. R.C. 1322.01.

4. REGISTRANT. "Registrant" means a person who has obtained a certificate from the superintendent of financial institutions for the transaction of business as a mortgage broker.

COMMENT

Drawn from R.C. 1322.02(A).

5. KNOWINGLY. OJI-CR 417.11.

6. FRAUD. OJI-CV Chapter 449.

7. DAMAGES. OJI-CV 525.19.

CV 525.11 Document retention, fee premiums, referral fees, and kickbacks R.C. 1322.071 ***[Rev. 10-11-08]***

1. GENERAL. The plaintiff claims that the defendant engaged in certain acts and practices as a (mortgage broker) (loan officer) that are prohibited by law.

2. CLAIM. In order to find that the defendant violated the law, you must find by the

greater weight of the evidence that the defendant, as a (mortgage broker) (loan officer),

(Use appropriate alternative[s])

(A) failed to return original documents provided by the plaintiff in connection with the loan application, including income tax returns, account statements, or other financial related documents.

(or)

(B) received, directly or indirectly, a premium on the fees charged for the services performed by a bona fide third party.

(or)

(C) paid or received, directly or indirectly, a referral fee or kickback of any kind to or from a bona fide third party or other party with a related interest in the transaction, such as a home improvement builder, real estate developer, or real estate broker or agent, for the referral of business.

3. BONA FIDE THIRD PARTY. "Bona fide third party" means a person that is not an employee of, related to, or affiliated with, the defendant, and that is not used for the purpose of circumvention or evasion of this section.

COMMENT

R.C. 1322.08(D).

4. DAMAGES. OJI-CV 525.19.

CV 525.13 Improper payment of fees to a mortgage broker R.C. 1322.08
[Rev. 10-16-08]

1. GENERAL. The plaintiff claims that the defendant as a mortgage broker accepted fees for services in violation of the law.

2. CLAIM. In order to find that the defendant violated the law, you must find by the greater weight of the evidence that the defendant, as a mortgage broker,

(Use appropriate alternative[s])

(A) failed to

(Use appropriate alternative[s])

(1) maintain a special account;

(or)

(2) deposit into the defendant's special account any bona fide third-party fee the defendant received;

(*or*)

(3) pay bona fide third-party fees to a bona fide third party from the defendant's special account.

(*or*)

(B) charged or received, directly or indirectly, fees for assisting the plaintiff in obtaining a mortgage, before all of the services that the defendant agreed to perform for the plaintiff were completed, and the proceeds of the mortgage loan were disbursed to or on behalf of the plaintiff.

COMMENT

R.C. 1322.08(B) permits certain fees to be paid for services performed by a bona fide third party in assisting the plaintiff to obtain a mortgage if the fees are either paid directly by the plaintiff to the bona fide third party or the fees are deposited by the defendant into the defendant's special account for services performed by the bona fide third party. These fees include (1) fees to obtain a report from a credit reporting agency; (2) fees for notary services; (3) fees for the performance of a title search, appraisal of real estate, or survey of the real estate; (4) fees charged by a lender for locking in an interest rate in connection with obtaining or refinancing a mortgage, provided that the fees do not exceed an amount equal to one and one-half percent of the mortgage loan amount; and (5) fees not exceeding $500 paid directly by the plaintiff to a state or federal government agency or instrumentality for the purposes of processing a mortgage application relating to a government sponsored or guaranteed mortgage program.

If an issue of fact arises whether a fee was for a permissible or impermissible purpose, the judge should draft an appropriate instruction.

(*or*)

(C) failed to return (the original or a copy of any appraisal) (the plaintiff's original documents prepared by a bona fide third party at the time the request for the mortgage is refused or denied) when the defendant is unable to assist in obtaining a mortgage for the plaintiff and fees have been paid by the plaintiff for the performance of a title search, appraisal of the real estate, or survey of the real estate.

3. BONA FIDE THIRD PARTY. "Bona fide third party" means a person that is not an employee of, related to, or affiliated with, the defendant, and that is not used for the purpose of circumvention or evasion of this section.

COMMENT

Drawn from R.C. 1322.08(D)(1).

4. SPECIAL ACCOUNT. "Special account" means a depository account with a financial institution, the deposits of which are insured by the Federal Deposit Insurance Corporation, that is separate and distinct from any personal or other account of the defendant, and that is maintained solely for the holding and payment of fees described in this section for services performed by bona fide third parties and received by the defendant from the plaintiff that the defendant assisted in obtaining a mortgage.

COMMENT

Drawn from R.C. 1322.08(D)(2).

5. MORTGAGE BROKER. R.C. 1322.01.

6. LOAN OFFICER. R.C. 1322.01.

7. DAMAGES. OJI-CV 525.19.

CV 525.15 Unlawful lending practices by a loan officer or mortgage broker R.C. 1322.081 ***[Rev. 10-16-08]***

1. GENERAL. The plaintiff claims that the defendant (mortgage broker) (loan officer) (person required to be licensed as a loan officer or registered as a mortgage broker) breached his/her/its fiduciary duties to the plaintiff.

2. CLAIM. In order to find for the plaintiff, you must find by the greater weight of the evidence that the defendant failed to

(Use appropriate alternative[s])

(A) (safeguard) (account for) money handled by the defendant for the (plaintiff) (borrower).

(or)

(B) follow reasonable and lawful instructions from the (plaintiff) (borrower).

(or)

(C) act with reasonable care, skill, and diligence.

(or)

(D) act in good faith and with fair dealing in any transaction, practice, or course of business in connection with the (brokering) (originating) of *(describe mortgage loan)*.

(or)

(E) make reasonable efforts to secure a mortgage loan for the (plaintiff) (borrower)

(1) from lenders with whom the defendant regularly does business; and

(2) with rates, charges, and repayment terms that were advantageous to the (plaintiff) (borrower).

3. LOAN OFFICER. R.C. 1322.01.

4. MORTGAGE BROKER. R.C. 1322.01.

5. DAMAGES. OJI-CV 525.19.

CV 525.17 Failure to include registration number on advertisements R.C. 1322.09 ***[Rev. 10-16-08]***

1. GENERAL. The plaintiff claims that the defendant advertised as a mortgage broker without including the information required by law.

2. CLAIM. In order to find that the defendant advertised as a mortgage broker without including the information required by law, you must find by the greater weight of the evidence that the defendant, as a mortgage broker, failed to disclose in any (printed) (televised) (broadcast) (electronically transmitted) (published) advertisement, including any electronic site accessible through the internet, relating to the defendant's services as a mortgage broker, the name and street address of the defendant and the number designated on the certificate of registration that was issued to the defendant by the superintendent of financial institutions.

3. MORTGAGE BROKER. R.C. 1322.01.

4. DAMAGES. OJI-CV 525.19.

CV 525.19 Damages R.C. 1322.11 ***[Rev. 10-16-08]***

1. DAMAGES. If you find in favor of the plaintiff, you will decide an amount of money that will reasonably compensate the plaintiff for the actual loss sustained as the natural and probable consequence of the defendant's violation.

2. MINIMUM DAMAGES. If you find in favor of the plaintiff, damages awarded shall not be less than all compensation paid directly and indirectly to the defendant from any source, plus reasonable attorney fees and court costs.

COMMENT

Drawn from R.C. 1322.11(A)(2).

3. PUNITIVE DAMAGES. OJI-CV 315.37.

COMMENT

R.C. 1322.11 permits the recovery of punitive damages for violation of certain sections of Chapter 1322. However, it provides no standards for the recovery of punitive damages. Although it is not clear whether a suit for liability under Chapter 1322 constitutes a "tort action" for purposes of R.C. 2315.21(A),

the Committee believes that because the acts constituting violations of Chapter 1322 are analogous to traditional torts, the substantive standards for punitive damages described in OJI-CV 315.37 are applicable to punitive damage determinations under R.C. Chapter 1322. The Committee also believes for the same reason that the procedural provisions (e.g., bifurcated trial) of R.C. 2315.21 should be applied.

CV 525.21 Violations by title insurance agents R.C. 3953.35 *[Rev. 10-16-08]*

COMMENT

S.B. 185, effective 1/1/2007, made the violations contained in this section violations of the Consumer Sales Practices Act. The Committee believes that prior court interpretations of the Consumer Sales Practices Act apply to violations of R.C. 3953.35.

1. GENERAL. The plaintiff claims that the defendant, as a licensed title insurance agent, violated the law concerning loans not exceeding seventy-five thousand dollars.

2. CLAIM. In order to find that the defendant violated the law, you must find by the greater weight of the evidence that the defendant, as a licensed title insurance agent in connection with a mortgage loan of seventy-five thousand dollars or less, knowingly

(Use appropriate alternative[s])

(A) coerced or wrongfully instructed the plaintiff to enter into the loan;

(or)

(B) failed to disclose to the plaintiff that the plaintiff did not have to close on the loan;

(or)

(C) made a material misrepresentation to the plaintiff regarding the terms of the loan.

3. TITLE INSURANCE AGENT. "Title insurance agent" means a person, partnership, or corporation authorized in writing by a title insurance company to solicit insurance and collect premiums and to issue or countersign policies on its behalf. "Title insurance agent" does not include officers and salaried employees of any title insurance company authorized to do title insurance business within this state.

COMMENT

R.C. 3953.01.

4. KNOWINGLY. OJI-CR 417.11.

5. SUBSTANTIAL COMPLIANCE (ADDITIONAL). It is not a defense to a claim under the Consumer Sales Practices Act that the defendant substantially complied with the law or that complete compliance is impossible.

COMMENT

See *Martin v. Bullinger* (1988), 43 Ohio App. 3d 136; *Brown v. Deacon Chrysler Plymouth* (1979), 14 Ohio Op.3d 436.

6. DAMAGES. If you find for the plaintiff, you will decide an amount of money that will reasonably compensate the plaintiff for the actual loss he/she/it sustained as the natural and probable consequence of the defendant's violation. The amount awarded may include a reasonable sum to compensate the plaintiff for mental anguish or emotional distress you find were actually suffered by the plaintiff as a consequence of the defendant's violation.

COMMENT

See *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481. In *Whitaker*, the Ohio Supreme Court held that non-economic damages, including damages for mental distress, were recoverable under the Consumer Sales Practices Act. The Court also held that non-economic damages were subject to trebling under R.C. 1345.09 under the same circumstances as economic damages. Effective October 31, 2007, the General Assembly limited the amount of non-economic damages recoverable to five thousand dollars for a violation of the Consumer Sales Practices Act.

7. BONA FIDE ERROR (ADDITIONAL). If you find for the plaintiff and award damages, you shall then decide whether the act or practice resulted from a bona fide error. "Bona fide" means that the action was taken in good faith, with honesty and sincerity, and without fraud or deceit. To establish a bona fide error, you must find by the greater weight of the evidence that the violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error.

COMMENT

R.C. 1345.11(A); *Andrews v. Scott Pontiac Cadillac GMC, Inc.* (1991), 71 Ohio App. 3d 613. The existence of a bona fide error does not prevent the award of actual damages to the plaintiff that result from a violation of the act. The presence of a bona fide error prevents, however, the award of attorney fees or civil penalties, which are awarded by the judge, not the jury. When the existence of a bona fide error is at issue in the case, the judge should provide the jury with

a separate interrogatory on bona fide error.

8. ACT COMMITTED KNOWINGLY. If you find that the defendant has committed an unfair or deceptive act or practice, you will also decide whether the defendant acted knowingly. To find an act or practice was committed knowingly, you must find that the defendant had actual knowledge that he/she was engaging in the act or practice; however, it is not necessary that the defendant knew that the act or practice violated the law.

COMMENT

This definition of "knowingly" only applies to a determination of whether the plaintiff is entitled to attorney fees under R.C. 1345.09.

Drawn from *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St. 3d 27. Whether an act or practice was committed "knowingly" can have a number of consequences under the Consumer Sales Practices Act. Many of the circumstances to be taken into account in deciding whether an act or practice is unconscionable require that the act or practice be done knowingly. Further, in order to recover attorney fees under R.C. 1345.09, a consumer must prove that a supplier committed an act or practice knowingly.

9. KNOWLEDGE OF POLICIES AND PROCEDURES (ADDITIONAL). A supplier is presumed to have knowledge of his/her/its policies and procedures and the language contained in his/her/its preprinted literature and advertising.

COMMENT

Karst v. Goldberg (1993), 88 Ohio App. 3d 413; *State ex rel Celebreeze v. Ferraro* (1989), 63 Ohio App. 3d 168.

10. KNOWLEDGE OF EMPLOYEE OR AGENT (ADDITIONAL). Knowledge obtained by an employee or agent (within the scope of his/her employment) (while he/she is working) becomes the knowledge of the employer even if the employee or agent never communicated it to the employer.

COMMENT

Drawn from *State ex rel Nicodemus v. Industrial Comm.* (1983), 5 Ohio St. 3d 58; *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Services, Inc.* (1992), 81 Ohio App. 3d 591.

CV 525.23 Unconscionable acts in connection with residential mortgages R.C. 1345.031 *[Rev. 10-11-08]*

COMMENT

For the Ohio Consumer Sales Practices Act to apply, one party to a transaction must be a "consumer," the other party must be a "supplier," and the transaction must be a "consumer transaction." Normally, the applicability of the statute will be a question of law. If the facts relating to the applicability of the statute are in dispute, the judge should draft appropriate instructions based upon the definitions contained in R.C. 1345.01.

1. GENERAL. The plaintiff claims that the defendant(s) committed an unconscionable act or practice in connection with a residential mortgage loan. An unconscionable act or practice violates this section whether it occurs before, during, or after the transaction.

2. CLAIM. In order to find that the defendant(s) committed an unconscionable act or practice in connection with a residential mortgage loan you must find by the greater weight of the evidence that the defendant(s)

(*Use appropriate alternative(s)*)

(A) (arranged for) (made) a mortgage loan to the plaintiff that provided for an interest rate that would apply after a default that is higher than the interest rate that applied before a default.

COMMENT

The interest rate excludes rates of interest for judgments applicable to the mortgage loan under section 1343.02 or 1343.03 of the Revised Code and also excludes interest rate changes in a variable rate loan transaction otherwise consistent with the provisions of the loan documents.

(*or*)

(B) engaged in a pattern or practice of consumer transactions with the (plaintiff) (plaintiff and others) based predominantly on the defendant's expectation of receiving the foreclosure or liquidation value of the consumer's collateral rather than the consumer's ability to repay the loan in accordance with its terms. (The defendant may use any reasonable method to determine a buyer's reasonable ability to repay.)

COMMENT

Because R.C. 1345.031, clearly provides that the claim for relief under this

paragraph focuses on the time the consumer transactions are made, the Committee believes that "realization" as used in the statute means "expectation," rather than actual receipt of the foreclosure or liquidation value. See, also, Home Ownership and Equity Protection Act (HOEPA) substantive regulation Section 34.3, Title 12, C.F.R. (providing that "[a] national bank shall not make a consumer loan subject to this subpart based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms").

(*or*)

(C) entered into a consumer transaction that permitted the defendant(s) to demand repayment of the outstanding mortgage loan in advance of the original maturity date unless the terms of the consumer transaction provide that the defendant(s) may do so in good faith due to the plaintiff's failure to abide by the material terms of the loan. A "material term" means one that is essential to the purpose of the contract.

COMMENT

Drawn from R.C. 1345.031(B)(3) and OJI-CV 501.01 paragraph 4.

(*or*)

(D) knowingly replaced, refinanced, or consolidated a (zero interest rate) (low-rate) mortgage loan made by a governmental or nonprofit lender with another loan.

COMMENT

There is no violation of this section, however, if the current holder of the loan consents in writing to the refinancing and the consumer presents written certification from a third-party nonprofit organization counselor approved by the United States Department of Housing and Urban Development or the Superintendent of Financial Institutions that the consumer received counseling on the advisability of the loan transaction. If a question of fact arises as to whether this exception applies, the trial judge should draft an appropriate instruction.

"Low-rate mortgage loan" means a mortgage loan that carries a current interest rate two percentage points or more below the current yield on United States treasury securities with a comparable maturity. If the loan's current interest rate is either a discounted introductory rate or a rate that automatically steps up over time, the fully indexed rate or the fully stepped-up rate, as applicable, shall be used in lieu of the current rate to determine whether a loan is a low-rate mortgage loan. In almost all cases, whether a loan is a "low-rate mortgage loan" will not involve questions of fact. If a question of fact arises as

to whether a loan is a "low-rate mortgage loan," the trial judge should draft an appropriate instruction.

Drawn from R.C. 1345.031(B)(4).

(*or*)

(E) instructed the plaintiff to ignore the lender's written information regarding the interest rate and dollar value of points based upon a representation that the interest rate and dollar value of points would be lower for the plaintiff's transaction than disclosed in the written information.

COMMENT

Drawn from R.C. 1345.031(B)(5).

(*or*)

(F) (recommended) (encouraged) the plaintiff to default on a (mortgage) (consumer transaction) (revolving credit loan agreement).

(*or*)

(G) charged a late fee to the plaintiff more than once with respect to a single late payment. (If a late payment fee is deducted from a payment made on the loan and such deduction causes a subsequent default on a subsequent payment, no late payment fee may be imposed for such default.) (If a late payment fee has been imposed once with respect to a particular late payment, no such fee may be imposed with respect to any future payment that would have been timely and sufficient but for the previous default.)

(*or*)

(H) failed to inform the plaintiff at the closing of the consumer transaction that

(1) the plaintiff was not required to complete the consumer transaction merely because the plaintiff had received prior estimates of closing costs or had signed an application; and

(2) the plaintiff should not close a loan transaction containing different terms and conditions than those the plaintiff was promised.

(*or*)

(I) arranged for or entered into a consumer transaction with the plaintiff that included terms under which more than two periodic payments required under the consumer transaction were consolidated and paid in advance from the loan proceeds provided to the consumer.

(*or*)

(J) knowingly (compensated) (instructed) (induced) (coerced) (intimidated) or attempted to (compensate) (instruct) (induce) (coerce) (intimidate) a licensed or certified real estate appraiser for the purpose of corrupting or improperly influencing the independent judgment of the person with respect to the value of a dwelling offered as security for repayment of a mortgage loan.

(*or*)

(K) directly or indirectly financed for the plaintiff any (credit) (life) (disability) (unemployment) insurance premiums, other life or health insurance premiums, or any debt collection agreement.

COMMENT

Insurance premiums calculated and paid on a monthly basis shall not be considered financed by the lender.

(*or*)

(L) knowingly or intentionally engaged in the act or practice of "flipping" a mortgage loan.

(*or*)

(M) knowingly took advantage of the plaintiff's inability to reasonably protect his/her interests because of his/her known physical or mental infirmities or illiteracy.

(*or*)

(N) entered into the consumer transaction knowing there was no reasonable probability of payment of the obligation by the plaintiff.

(*or*)

(O) attempted to enforce, by means not limited to a court action, a prepayment penalty.

COMMENT

This paragraph makes it a violation to attempt to enforce a prepayment penalty that violates R.C. 1343.011. This section of the Revised Code limits prepayment penalties based upon the length of the time since execution of the loan and the amount of the mortgage. Whether a prepayment penalty falls within R.C. 1343.011 will rarely present an issue of fact. If a question of fact as to whether the prepayment penalty is within 1343.011, the judge should draft an appropriate instruction.

(*or*)

(P) engaged in an act or practice deemed unconscionable by *(insert applicable rule[s] adopted by the Attorney General pursuant to R.C. 1345.02(B)(2)).*

(*or*)

(Q) attempted to enforce against the plaintiff an unconscionable arbitration clause included in a mortgage loan contract.

(*or*)

(R) attempted to enforce against the plaintiff an unconscionable clause requiring the plaintiff to pay the defendant's attorney fees included in a mortgage loan contract.

(*or*)

(S) attempted to enforce against the plaintiff an unconscionable liquidated damages clause in a mortgage loan contract.

(*or*)

(T) attempted to induce the plaintiff to take an action desired by the defendant by referring to an unconscionable arbitration clause, an unconscionable clause requiring the consumer to pay the defendant's attorney fees, or an unconscionable liquidated damages clause that was included in a mortgage loan contract.

3. UNCONSCIONABLE. OJI-CV 521.03.

4. PATTERN OR PRACTICE. "Pattern or practice" means something more than isolated, random, or accidental acts. Whether the defendant(s) (is) (are) engaging or (has) (have) engaged in a pattern or practice of violations depends on the totality of the circumstances (but a pattern or practice can be established without the use of a statistical process).

COMMENT

Drawn from Section 226.34(a)(4)-2, Title 12, C.F.R. Federal Reserve staff commentary. This regulation implements Section 1639, Title 15, U.S. Code, which is the analogous federal statute to R.C. 1345.031.

5. KNOWINGLY. OJI-CR 417.11.

6. SUBSTANTIAL COMPLIANCE. OJI-CV 521.01 § 8.

7. DAMAGES. OJI-CV 521.01 § 9.

8. BONA FIDE ERROR (ADDITIONAL). OJI-CV 521.01 § 10.

9. ACT COMMITTED KNOWLINGLY. OJI-CV 521.01 § 11.

10. KNOWLEDGE OF POLICIES AND PROCEDURES (ADDITIONAL). OJI-CV 521.01 § 12.

11. KNOWLEDGE OF EMPLOYEE OR AGENT. OJI-CV 521.01 § 13.
12. FLIPPING. R.C. 1345.031(B)(12).
13. CONSUMER TRANSACTION. R.C. 1345.01.
14. FRAUD. OJI-CV Chapter 449.

(Text continued on page 555)

Chapter CV 529

NONCONFORMING MOTOR VEHICLE (LEMON LAW)

CV 529.01 **Nonconforming motor vehicle (Lemon Law) R.C. 1345.71 et seq.** *[Rev. 8-20-08]*

CV 529.01 Nonconforming motor vehicle (Lemon Law) R.C. 1345.71 et seq. *[Rev. 8-20-08]*

1. GENERAL. This action is brought by the plaintiff to (recover damages from) (require the replacement of a vehicle by) the defendant. To recover, the plaintiff must prove that the

(A) plaintiff is a (purchaser) (lessee of one month or more) (transferee) (person entitled to enforce the warranty) of a motor vehicle covered by a written warranty; and

(B) motor vehicle does not conform to (*describe applicable express warranties*); and

(C) plaintiff reported the nonconformity to the (manufacturer) (manufacturer's agent) (manufacturer's authorized dealer) during the period of one year following the original date of delivery or the first 18,000 miles of operation, whichever is earlier; and

(D) (manufacturer) (manufacturer's agent) (manufacturer's authorized dealer) was unable to conform the motor vehicle to (describe applicable express warranties) by repairing or correcting any defect or condition that substantially impaired the (use) (safety) (value) of the motor vehicle to the plaintiff after a reasonable number of repair attempts.

COMMENT

The elements are drawn from R.C. 1345.71 and 1345.72. The definitions of "manufacturer," R.C. 1345.71 and 4517.01, "distributor," R.C. 4517.01, "express warranty" and "warranty," R.C. 1345.71, and "motor vehicle," R.C. 1345.71, are questions of law and usually do not involve fact issues.

The omission of the language "to the plaintiff" is error. *Brinkman v. Mazda Motor of Am., Inc.* (May 13, 1994), Lucas App. No. L-93-142.

There is some disagreement as to whether substantial impairment to the consumer is measured by a "subjective" or "objective" standard. Compare

Brinkman v. Mazda Motor of America, Inc. (May 13, 1994), Lucas App. No. L-93-142, and *Lesjack v. Forest River, Inc.*, Tuscarawas App. No. 2003 AP050037, 2004-Ohio-245 with *Iams v. Daimler Chrysler Corp.*, 174 Ohio App.3d 537, 2007-Ohio-6709. The Committee believes that the proper test has both subjective and objective elements, similar to the test for substantial impairment under R.C. 1302.66 (section 2-608 of the U.C.C.). The test is subjective in the sense that it is not necessary that the defect substantially impair the value of the goods to the average buyer, the reasonable buyer, or the reasonably foreseeable buyer. However, for the Lemon Law to apply at all, there must first be a defect or condition that is in breach of the manufacturer's warranty. Whether there is a breach of warranty will be measured by an objective standard of reasonableness. The determination that the breach of warranty (non-conformity) substantially impairs the value of the vehicle to the plaintiff must also be based on objective evidence of the plaintiff's needs; the plaintiff's mere assertion of substantial impairment will be insufficient. See *McCullough v. Bill Swad Chrysler-Plymouth, Inc.* (1983), 5 Ohio St.3d 181, construing analogous R.C. 1302.66.

The one year begins to run with the original delivery of the vehicle. Thus, if consumer B purchases the vehicle from consumer A after consumer A has owned the vehicle for seven months, consumer B must report the nonconformity within five months. The original date of delivery is the date of delivery to consumer A. In certain cases, the judge may have to modify the instruction to make this clear to the jury.

It is not clear whether the Lemon Law is applicable if a consumer notifies the defendant of a nonconformity within the statutory time period (i.e., one year or 18,000 miles) but outside the period of the written warranty (e.g., if the written warranty is one year or 12,000 miles, whichever comes first). The Committee believes that the Lemon Law does not apply to this situation. Under R.C. 1345.72(A), the motor vehicle must fail to conform to an applicable express warranty in order for the defendant to be obligated to make repairs. Similarly, under R.C. 1345.72(B) the manufacturer is obligated to replace the vehicle only if the dealer is unable to conform the vehicle to an applicable express warranty.

2. REASONABLE REPAIR ATTEMPTS.

COMMENT

The presumption of a reasonable number of repair attempts contained in R.C. 1345.73(A)-(D) only applies if all the repairs are attempted within the one year/18,000 mile notice period. If all the repair attempts are made within that period and the jury finds that any of the conditions set forth in R.C. 1345.73(A)-(D) exist, then as a matter of law the jury must conclude that a reasonable number of repair attempts were made. *Royster v. Toyota Motor Sales*, 92 Ohio St.3d. 327, 2001-Ohio 212. See instruction (B) below.

If all or some of the repair attempts occur outside of the one year/18,000 mile

notice period, then R.C. 1345.73(A)-(D) has no application and the jury must determine from all of the facts and circumstances if a reasonable number of repair attempts were made. See instruction (A) below.

(A) You must decide whether the defendant made a reasonable number of repair attempts. You should consider the number of requests for repair made by the plaintiff, the nature and number of repair attempts made by the defendant, the period of time the motor vehicle was out of service because of such repairs, the nature of the nonconformity and its effect upon the (use) (safety) (value) of the motor vehicle to the plaintiff, and all other facts and circumstances in evidence.

(B) You must find, however, that a reasonable number of repair attempts were made by the defendant if you find that during the period of one year following the original date of delivery of the motor vehicle or the first 18,000 miles of operation, whichever is earlier, one or more of the following occurred:

(*Use appropriate alternative[s]*)

(1) substantially the same nonconformity has been subject to repair three or more times and either continued to exist or recurred.

(*or*)

(2) the vehicle was out of service by reason of repair for a cumulative total of thirty or more calendar days.

(*or*)

(3) there have been eight or more attempts to repair any nonconformity.

(*or*)

(4) there has been at least one attempt to repair a nonconformity that results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven, and the nonconformity either continued to exist or recurred.

COMMENT

R.C. 1345.73 has been referred to as the "enough is enough" portion of the Lemon Law statute. This section looks to the amount of repair activity a vehicle requires to determine whether it is a Lemon. This part of the statute draws the line between reasonable and unreasonable flaws in a vehicle. If any of the above four has taken place, regardless of whether the vehicle was repaired thereafter, the consumer has not received what he or she bargained for and is entitled to recovery. *Royster v. Toyota Motor Sales*, 92 Ohio St. 3d. 327.

3. NONCONFORMITY. R.C. 1345.71.

4. AFFIRMATIVE DEFENSE. If you find by the greater weight of the evidence that

the nonconformity is the result of (abuse) (neglect) (unauthorized modification or alteration by anyone other than the [manufacturer] [manufacturer's agent] [manufacturer's authorized dealer]), you will find for the defendant.

COMMENT

Drawn from R.C. 1345.75(D).

5. DAMAGES. If you find for the plaintiff, you shall award the following damages if proved by the greater weight of the evidence:

(A) the full purchase price of the vehicle, and

(B) all incidental damages, including, but not limited to, any fees charged by the lender or lessor for making or canceling the loan or lease, interest paid on money borrowed to finance the purchase of the vehicle, and any expenses incurred by the consumer as a result of the nonconformity, such as charges for towing, vehicle rental, meals, and lodging.

COMMENT

Drawn from R.C. 1345.71(F) and 1345.72(B).

A plaintiff must elect between damages and replacement of the vehicle. In the latter case, the jury's verdict would be ". . . for the defendant." or ". . . for the plaintiff and for reasonable attorney fees." In such event no "damages" instruction should be given.

Incidental damages may include interest accrued on money borrowed to finance the purchase of the vehicle. The Lemon Law statute creates a remedy for consumers aimed at making the consumer whole again. *Collins v. Mullinax East*, 153 Ohio App.3d 534, 2003 Ohio 3497.

6. REASONABLE ATTORNEY'S FEES.

COMMENT

Under R.C. 1345.75(A), a plaintiff entitled to recover under R.C. 1345.72 is entitled to recover reasonable attorney's fees and all court costs. See OJI-CV 315.39.

Chapter CV 533

DISCRIMINATION

CV 533.01 General *[Rev. 3-22-03]*

CV 533.03 Disparate treatment claim—indirect evidence *[Rev. 3-22-03]*

CV 533.05 Disparate treatment claim—some direct evidence *[Rev. 3-22-03]*

CV 533.07 Disparate (adverse) impact claim *[Rev. 3-22-03]*

CV 533.09 Affirmative defense—job related business necessity *[Rev. 3-22-03]*

CV 533.11 Disability discrimination *[Rev. 2-21-09]*

CV 533.13 Reasonable accommodation *[Rev. 3-22-03]*

CV 533.15 Sexual harassment-loss of tangible job benefit *[Rev. 3-28-09]*

CV 533.17 Sexual harassment-hostile work environment *[Rev. 3-28-09]*

CV 533.19 Retaliation *[Rev. 3-22-03]*

CV 533.21 Additional affirmative defenses *[Rev. 3-22-03]*

CV 533.23 Constructive discharge *[Rev. 3-22-03]*

CV 533.25 Damages in discrimination cases *[Rev. 3-22-03]*

COMMENT

Ohio laws against discrimination are generally found in R.C. Chapter 4112 and may be classified into two types, "disparate treatment" and "disparate impact."

"Disparate treatment" refers to those cases in which an individual claims intentional discrimination in employment because of membership in a protected class. For instance, an employee may claim that he was not hired because he was too old. In a "disparate treatment" case, the employee may prove the case by direct or circumstantial evidence or both. In discrimination cases, the terms "direct" and "circumstantial" have a specialized meaning. See the cases cited below.

In a circumstantial evidence case, the employee may adduce evidence, for instance, that younger people with lesser qualifications were hired instead of the employee. In a "disparate treatment" case using circumstantial evidence, the employee must prove that membership in a protected class was a determining factor in the employer's challenged conduct. See OJI-CV 533.03. In a "disparate treatment" case using direct evidence, where for instance there has been an admission of discriminatory intent, the burden of persuasion shifts to the employer to prove that the challenged job action would have occurred regardless of the discriminatory intent. See OJI-CV 533.05.

The court should make the determination at the earliest possible time whether the case is a direct evidence case. For guidance on determining what is direct

evidence of discrimination, see, e.g., *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265; *Byrnes v. LCI Communication Holdings Co.*, 77 Ohio St.3d 125, 1996-Ohio-307; *Wexler v. White's Furniture, Inc.* (C.A. 6, 2003) 317 F.3d 564; *Bartlik v. U.S. Dept. of Labor* (C.A. 6, 1996), 73 F.3d 100, 102-103; *Talley v. Bravo Pitino Restaurant, Ltd.* (C.A. 6, 1995), 61 F.3d 1241, 1248-49; *Manzer v. Diamond Shamrock Chem. Co.* (C.A. 6, 1994), 29 F.3d 1078, 1081; *Phelps v. Yale Security, Inc.* (C.A. 6, 1993), 986 F.2d 1020, 1025; *Terbovitz v. Fiscal Court of Adair Co.* (C.A. 6, 1987), 825 F.2d 111, 115; *Blalock v. Metals Trades, Inc.* (C.A. 6, 1985), 775 F.2d 703, 706-707, n. 5.

In a "disparate impact" case, a facially neutral employment practice causes an imbalance in the treatment of a protected class. For instance, requiring firefighters to lift one hundred fifty pounds may have the impact of discriminating or excluding on the basis of age.

CV 533.01 General *[Rev. 3-22-03]*

1. EMPLOYEE'S CLAIM. The employee claims that the employer discriminated against him/her by (*describe challenged conduct*) because of his/her (race) (color) (religion) (sex) (pregnancy) (national origin) (age) (ancestry) (*insert other legally protected classification*).

2. EMPLOYER'S CLAIM. The employer claims that the (*describe challenged conduct*) was not because of the employee's (race) (color) (religion) (sex) (pregnancy) (national origin) (age) (ancestry) (*insert other legally protected classification*), but was because of (the employee's [unsatisfactory job performance] [misconduct]) (*describe other legitimate non-discriminatory reason*).

COMMENT

Drawn from R.C. 4112.02 and The Civil Rights Act of 1964 (Title VII), 42 U.S. Code 2000e-2.

An "employer" under R.C. Chapter 4112 includes supervisors and managers "acting in the interest of the employer." *Genaro v. Central Transport, Inc.*, 84 Ohio St.3d 293, 1999-Ohio-353.

Age is defined by R.C. 4112.01(A)(14) as "at least forty years old." The court may need to define what is meant by "ancestry," "national origin," or other legally protected classifications.

CV 533.03 Disparate treatment claim—indirect evidence *[Rev. 3-22-03]*

COMMENT

This instruction applies to a disparate treatment claim when there is no direct evidence of discrimination. Whether direct evidence has been produced is a question of law for the court. When there is direct evidence presented, then

OJI-CV 533.05 applies.

1. GENERAL. The employee must prove by the greater weight of the evidence that (race) (color) (religion) (sex) (pregnancy) (national origin) (age) (ancestry) (*insert other legally protected classification*) was a determining factor for (*describe challenged conduct*).

COMMENT

R.C. Chapter 4112.

McDonnell Douglas Corp. v. Green (1973), 411 U.S. 792, 807, which was followed by *Plumbers & Steamfitters v. Ohio Civil Rights Comm.* (1981), 66 Ohio St.2d 192, provides a three-step process in indirect evidence cases for allocating burdens of production and persuasion.

The burden of production rests first on the employee to establish a prima facie case. For example, discriminatory intent may be established indirectly if the employee proves that he/she was a member of a statutorily protected class, was qualified but was discharged and replaced by a person not belonging to the protected class. *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 1996-Ohio-265; *Byrnes v. LCI Communication Holdings Co.*, 77 Ohio St.3d 125, 1996-Ohio-307 (relying on *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146). If the employee establishes a prima facie case, then the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the challenged conduct. If articulated, the burden shifts back to the employee to show that the employer's reason(s) are pretextual. *McDonnell Douglas, supra*. See also *Chappell v. GTE Products Corp.* (C.A. 6, 1986), 803 F.2d 261, 265.

The burden of persuasion, however, rests at all times with the employee in indirect evidence cases. *Chappell, supra*. Rather than confuse the jurors with legal definitions of the burdens of persuasion and production and how they shift under *McDonnell Douglas, supra*, the above instruction is clear and preferable. *In re Lewis* (C.A. 6, 1988), 845 F.2d 624. For purposes of deciding a directed verdict by the court, the *McDonnell Douglas* three-step test remains in effect, as explained in *St. Mary's Honor Center v. Hicks* (1993), 509 U.S. 502.

2. DETERMINING FACTOR. "Determining factor" means that the employee's (race) (color) (religion) (sex) (pregnancy) (national origin) (age) (ancestry) (*insert other legally protected classification*) made a difference in the (*describe challenged conduct*). There may be more than one reason for the employer's decision to (*describe challenged conduct*). The employee need not prove that (race) (color) (religion) (sex) (pregnancy) (national origin) (age) (ancestry) (*insert other legally protected classification*) was the only reason. It is not a determining factor if the employee would have been (*describe challenged conduct*) regardless of his/her (race) (color) (religion)

(sex) (pregnancy) (national origin) (age) (ancestry) (*insert other legally protected classification*).

COMMENT

Cleveland Civil Service Comm. v. Ohio Civil Rights Comm. (1991), 57 Ohio St.3d 62, 65; *Plumbers & Steamfitters v. Ohio Civil Rights Comm.* (1981), 66 Ohio St.2d 192, 198-199. See also *St. Mary's Honor Center v. Hicks* (1993), 509 U.S. 502 (the action complained of must be done because of intentional discrimination).

3. EMPLOYMENT AT WILL—BUSINESS JUDGMENT. The employment relationship in this case allows the employer to terminate the employee at any time for any reason, except for a discriminatory reason. It is unlawful for any employer to terminate an employee because of (race) (color) (religion) (sex) (pregnancy) (national origin) (age) (ancestry) (*insert other legally protected classification*).

The employer claims that he/she/it acted for non-discriminatory reasons. In deciding whether an employer has acted for discriminatory reasons, you should not substitute your judgment for that of the employer, even if you would have made a different business decision.

4. DISCIPLINE POLICY CASES—OPTIONAL. The employer is not required to give the employee progressive discipline or any warning concerning job performance before (*describe challenged conduct*) can occur. Similarly, the employee has the right to end the employment relationship without any notice to the employer. However, in deciding whether an employer acted with a discriminatory reason, you may consider whether the employer followed his/her/its own policies.

COMMENT

The court should give the foregoing optional instruction only when there is no disciplinary policy or no evidence of discriminatory application of such policy. Even when the instruction is given, the employee may still argue that the employer's failure to follow the disciplinary policy may be considered by the jury in determining whether the employer acted for a non-discriminatory reason.

CV 533.05 Disparate treatment claim—some direct evidence *[Rev. 3-22-03]*

COMMENT

This instruction applies in cases where the employee has produced some direct evidence of discrimination. See Introductory Comment; *Mauzy*, *supra*; *Byrnes*,

supra; *Smith v. E.G. Baldwin & Assoc.* (1997), 1997 Ohio App. LEXIS 1763.

1. GENERAL. If you find that the employee has proven by the greater weight of the evidence that (*describe the direct evidence of the employer's discriminatory conduct*), then you must find in favor of the employee, unless the employer proves by the greater weight of the evidence that the employee would have been (*describe challenged conduct*) independent of the employee's (race) (color) (religion) (sex) (pregnancy) (national origin) (age) (ancestry) (*insert other legally protected classification*).

CV 533.07 Disparate (adverse) impact claim *[Rev. 3-22-03]*

1. EMPLOYEE'S CLAIM. The employee claims that the employer has caused an adverse impact on persons of his/her (*insert legally protected classification*). An adverse impact is the consequence of an employment practice or decision-making process that appears neutral in its treatment of different groups but, in fact, affects one group more harshly than another group when it is actually applied. To find an adverse impact, you do not need to find that the employer intended to discriminate against persons of the employee's (*insert legally protected classification*). Instead, you must focus on the consequences or results of the employment practice or decision-making process at issue. The employee is not required to identify a particular or specific practice or element of a decision-making process that caused the adverse impact if the practices or elements cannot be separated for analysis.

2. ELEMENTS. Before you can find for the employee, you must find by the greater weight of the evidence that

(A) the employee is a member of a (*insert legally protected classification*); and

(B) there is an adverse effect on a statistically significant number of employees who are members of a (*insert legally protected classification*); and

(C) the challenged employment practice proximately caused the adverse effect in the employer's work force.

If you decide that the employee has failed to prove any of these elements, then you must decide in favor of the employer.

3. PROXIMATE CAUSE. OJI-CV Chapter 405.

COMMENT

The foregoing are the elements of the prima facie case in the disparate impact analysis. See *Griggs v. Duke Power Co.* (1971), 401 U.S. 424; *Dothard v. Rawlinson* (1971), 433 U.S. 321.

4. AFFIRMATIVE DEFENSE—JOB RELATED BUSINESS NECESSITY. OJI-CV 533.09.

CV 533.09 Affirmative defense—job related business necessity *[Rev. 3-22-03]*

1. GENERAL. OJI-CV 303.03 § 4.

2. JOB RELATED BUSINESS NECESSITY. The employer claims that the (*describe challenged employment practice*) was job related and a business necessity. If all the elements of job related business necessity are proved than you must find for the employer. "Job related business necessity" occurs when the employment practice

(A) has a clear relationship or connection to the (*describe job or position in question*); and

(B) (substantially promotes safe, efficient, or successful job performance) (is required due to economic distress).

Nevertheless, if the employee proved by the greater weight of the evidence that the employer had a suitable alternative employment practice that would have resulted in a less adverse impact which the employer refused to adopt, then you must find that the employer has failed to establish the affirmative defense of job related business necessity. A suitable alternative is one that would also have substantially promoted safe, efficient, or successful job performance.

COMMENT

Dothard v. Rawlinson (1977), 433 U.S. 321; *Albemarle Paper Co. v. Moody* (1975), 422 U.S. 405; *Griggs v. Duke Power Co* (1971), 401 U.S. 424; *Chrisner v. Complete Auto Transit, Inc.* (C.A. 6, 1981), 645 F.2d 1251.

CV 533.11 Disability discrimination *[Rev. 2-21-09]*

COMMENT

For an overview of disability discrimination, see generally *Hood v. Diamond Products, Inc.*, 74 Ohio St.3d 298, 1996-Ohio-259; *Cleveland Civil Service Comm. v. Ohio Civil Rights Comm.* (1991), 57 Ohio St.3d 62; *Hazlett v. Martin Chevrolet* (1986), 25 Ohio St.3d 279; *Greater Cleveland Regional Transit Authority v. Ohio Civil Rights Comm.*(1989), 58 Ohio App.3d 20.

1. CLAIMS. The employee claims that the employer discriminated against him/her because he/she (has) (has a record of) (is regarded as having) a disability. The employer denies that (the employee is disabled) (he/she/it discriminated against the employee because of the claimed disability).

COMMENT

In cases where the employee claims that the employer failed to accommodate his/her disability, see OJI-CV 533.13.

2. ELEMENTS. Before you can find for the employee, you must find by the greater weight of the evidence that

(A) the employee (has) (has a record of) (is regarded as having) a physical or mental impairment that substantially limits one or more major life activities; and

(B) the employee was qualified for the position of (*insert job title*) because he/she satisfies the skill, experience, education, and other job-related requirements for the position; and

(C) the employee can perform

(*Use appropriate alternative[s]*)

(1) the essential functions of the position of (*insert job title*); and

(*or*)

(2) the essential functions of the position of (*insert job title*) with reasonable accommodation; and

(D) the employee's disability was a determining factor in the employer's decision to (*describe challenged conduct*).

3. PHYSICAL OR MENTAL IMPAIRMENT.

(A) The term ''physical or mental impairment" includes any of the following

(*Use appropriate alternative[s]*)

(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine system.

(*or*)

(2) any mental or psychological disorder, including, but not limited to, mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(*or*)

(3) diseases and conditions, including, but not limited to, orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular

dystrophy, multiple sclerosis, cancer, heart disease, diabetes, human immunodeficiency virus infection, mental retardation, emotional illness, drug addiction, and alcoholism.

(B) The term "physical or mental impairment" does not include any of the following:

(*Use appropriate alternative[s]*)

(1) homosexuality and bisexuality.

(*or*)

(2) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.

(*or*)

(3) compulsive gambling, kleptomania, or pyromania.

(*or*)

(4) psychoactive substance use disorders resulting from current illegal use of a controlled substance.

COMMENT

Drawn from R.C. 4112.01.

4. DISABILITY. "Disability" means a physical or mental impairment that substantially limits one or more major life activities."Major life activities" include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

COMMENT

Drawn from R.C. 4112.01 and ADA Amendments Act of 2008, Section 12102(a)(1) and (2), Title 42, U.S. Code. Although Ohio courts have not yet addressed the applicability of the ADA Amendments Act of 2008, the Ohio Supreme Court has consistently followed federal law in this area.

5. SUBSTANTIALLY LIMITING. A physical or mental impairment "substantially limits" one or more of a person's major life activities when it

(*Use appropriate alternative[s]*)

(A) renders the employee unable to perform a major life activity that the average person could perform.

(*or*)

(B) significantly restricts, as to condition, manner or duration, the individual's ability to perform a particular major life activity as compared to the condition, manner or duration under which the average person could perform the same major life activity.

COMMENT

See ADA Amendments Act of 2008, Section 12102(a)(4), Title 42, U.S. Code; *Hood v. Diamond Products, Inc.*, 74 Ohio St.3d 298, 1996-Ohio-259; Section 1630.2(j), (i) and (ii), Title 29 C.F.R.

6. EFFECT OF ASSISTIVE MEASURES - OPTIONAL. In deciding whether the employee is disabled, you must not consider the employee's condition after the effect of any assistance from medicines, prosthetic devices, or (*describe other assistive measures*), used by the employee.

COMMENT

See ADA Amendments Act of 2008 for those mitigating measures that may be considered, such as eyeglasses.

7. EFFECT OF IMPAIRMENT. The determination of whether the employee has a physical or mental impairment should not be based on the name or mere diagnosis of the impairment. Rather, it depends upon the effect the impairment has on the employee's life. A condition that is not disabling for one individual may be disabling for another.

COMMENT

R.C. 4112.01(A)(16); *Toyota v. Williams* (2001), 534 U.S. 184; Section 1630.2(h), Title 29 C.F.R.; 56 Fed. Reg. 35,741 (1991); *Chandler v. City of Dallas* (C.A.5, 1993), 2 F.3d 1385, 1386, cert. denied (1994), 511 U.S. 1011.

8. RECORD OF AN IMPAIRMENT. An employee has a record of an impairment if he/she has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. Many types of records might contain this information, including medical, educational, or employment records. An employee may have a record of an impairment even though he/she has (recovered from a physical or mental impairment that previously limited a major life

activity) (been misclassified as having a mental or physical impairment that substantially limits one or more major life activities).

COMMENT

Drawn from 42 U.S.C. 12102 (2) (B) – (C); *Vaughan v. Harvard Indus., Inc.* (W.D.Tenn. 1996), 926 F.Supp. 1340, 1345–46; *Henderson v. Ardco, Inc.* (C.A.6, 2000), 247 F.3d 645; *Swanson v. Univ. of Cincinnati* (C.A. 6, 2001), 268 F.3d 307.

9. REGARDED AS HAVING AN IMPAIRMENT. An employee meets the requirement of being regarded as having an "impairment" if he/she establishes that he/she has been subjected to a prohibited action because of an actual or perceived physical or mental impairment, regardless of whether the impairment limits, or is perceived to limit, a major life activity.

COMMENT

Drawn from ADA Amendments Act of 2008, Section 12102(a)(3), Title 42, U.S. Code.

10. ESSENTIAL FUNCTIONS. "Essential functions" means the fundamental duties of the job, as opposed to marginal duties of the job. If you find that employees are not actually required to perform the function, it is not an essential function.

If you find that the job function is actually required to be performed by employees in the job, you must consider the following factors in deciding whether the job function is essential:

(*Use appropriate alternative[s]*)

(A) the position exists to perform the function;

(*or*)

(B) there are a limited number of other employees available to perform the function, or among whom the function can be distributed;

(*or*)

(C) a function is highly specialized and the person in the position is hired for special expertise or ability to perform it.

In addition, you may but are not required to consider the following factors when deciding whether a particular job function is essential:

(1) the employer's judgment as to which functions are essential;

(2) written job descriptions prepared before advertising the position or interviewing applicants for the position;

(3) the amount of time the employee must spend performing the function;

(4) the consequences of not requiring the employee to perform the function;

(5) the work experience of past employees in the job;

(6) the current work experience of employees in similar jobs; and

(7) all other facts and circumstances in evidence.

COMMENT

Section 1630.2(n), Title 29 C.F.R.; 56 Fed. Reg. 35,743 (1991); H.R. Conf. Rep. No. 101-596, 101st Cong., 2nd Sess. 58 (1990); *Hall v. United States Postal Serv.* (C.A.6, 1988), 857 F.2d 1073.

11. REASONABLE ACCOMMODATION. OJI-CV 533.13.

COMMENT

If reasonable accommodation is an issue in the case, the court should read all applicable portions of OJI-CV 533.13.

CV 533.13 Reasonable accommodation *[Rev. 3-22-03]*

1. GENERAL. An employer must make reasonable accommodation to an (employee's) (applicant's) disability, so long as the accommodation does not impose an undue hardship on the operation of the business.

2. CLAIMS. The employee claims that with reasonable accommodation he/she could have performed the essential functions of the job.

The employer (denies that he/she/it [*describe challenged conduct*]) (claims that he/she/it made a reasonable accommodation) (claims that there was no reasonable accommodation he/she/it could have made without undue hardship to the operation of the business).

3. ELEMENTS. Before you can find for the employee you must find by the greater weight of the evidence that

(A) the employee (has) (has a record of) (is regarded as having) a physical or mental impairment that substantially limits one or more major life activities; and

(B) he/she was qualified for the position of (*insert job title*) since he/she satisfies the skill, experience, education and other job-related requirements for the position; and

(C) he/she can perform the essential functions of the position of (*insert job title*) with reasonable accommodation; and

(D) the employee requested that the employer accommodate his/her disability; and

COMMENT

Generally, the employee must request an accommodation. However, where facts arise that give notice to an employer that an accommodation is necessary without a specific request from an employee, the law is unsettled as to whether a specific request is necessary.

(E) the employer failed to reasonably accommodate his/her disability.

4. REASONABLE ACCOMMODATION. "Reasonable accommodation" means modification to or adjustment of the work environment, or to the manner or circumstances under which a job is customarily held or performed. Reasonable accommodation is best understood as a means by which obstacles to the equal employment opportunity of an individual with a disability are removed or lessened. Reasonable accommodation may include

(*Use appropriate alternative[s]*)

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities.

(*or*)

(B) job restructuring.

(*or*)

(C) part-time or modified work schedules.

(*or*)

(D) appropriate modifications of examinations, training materials or policies.

(Text continued on page 571)

(*or*)

(E) the provision of qualified readers or interpreters.

(*or*)

(F) reassignment to a vacant position for which the employee is qualified (but an employer is not required to create another job).

COMMENT

56 Fed. Reg. 35,744 (1991); Section 1630.2(o), Title 29 C.F.R.; *School Bd. of Nassau County, Fla. v. Arline* (1987), 480 U.S. 273, 289 n.19. For the interplay between collective bargaining and reassignment, see *Aka v. Washington Hosp. Ctr.* (C.A.D.C. 1997), 116 F.3d 876, 893; *Eckles v. Consolidated Rail* (C.A. 7, 1996), 94 F.3d 1041, 1050-51; *Benson v. Northwest Airlines* (C.A. 8, 1995), 62 F.3d 1108, 1114; *Emrick v. Libbey-Owens Ford Corp.* (E.D.Tex. 1995), 875 F. Supp. 393, 395–97.

(*or*)

(G) (*describe similar accommodations*).

COMMENT

R.C. 4112.02(Q)(2)(f); Americans with Disabilities Act, 42 U.S. Code 12111(g); 29 C.F.R. 1630.2(o); *Wooten v. City of Columbus* (1993), 91 Ohio App.3d 326; *Sizemore v. Dept. of Rehab. & Corr.* (1992), 63 Ohio Misc.2d 319.

5. AFFIRMATIVE DEFENSES.

(A) GENERAL. OJI-CV 303.03 § 4.

(B) IMPOSSIBILITY. The employer claims that there was no accommodation he/she/it could make that would enable the employee to perform the essential functions of the job.

(C) UNDUE HARDSHIP. The employer claims that the possible accommodation(s) would impose an undue hardship on the operation of the employer's business. "Undue hardship" means significant difficulty and expense incurred by an employer. In determining whether accommodation would impose an undue hardship, you may consider the following factors:

(1) the nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions or outside funding;

(2) the financial resources of the employer's facility or facilities involved in the

provision of the accommodation, the number of persons employed at such facility, and the effect on the employer's expenses and resources;

(3) the financial resources of the employer as a whole, the overall size of the business with respect to its total number of employees, and the number, type and location of its facilities;

(4) the type of operation or operations of the employer, including the composition, structure, and functions of the work force, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer;

(5) the impact of the accommodation upon the operation of the facility involved, including the impact on the ability of the other employees to perform their duties and the impact on the facility's ability to conduct business.

COMMENT

R.C. 4112.02(Q)(2)(f); 42 U.S.C. 12111(10)(b); Section 1630.15(d), Title 29, C.F.R; *Greater Cleveland Regional Transit Auth. v. Ohio Civil Rights Comm.* (1989), 58 Ohio App.3d 20.

(D) BONA FIDE OCCUPATIONAL HAZARD. The employer claims that the employee's (continued) employment would significantly increase the occupational hazards affecting the employee, other employees, the general public, or the facilities in which the work is to be performed. The employer is not required to employ a disabled person under circumstances that would significantly increase occupational hazards.

COMMENT

Drawn from R.C. 4112.02(L); *Chevron U.S.A. Inc. v. Echazabal* (2002), 536 U.S. 73, Ohio Adm. Code 4112-5-08(D)(3); *Greater Cleveland Regional Transit Auth. v. Ohio Civil Rights Comm.* (1989), 58 Ohio App.3d 20.

CV 533.15 Sexual harassment-loss of tangible job benefit *[Rev. 3-28-09]*

COMMENT

This instruction is intended for use only in cases in which it is alleged that a tangible job benefit was denied or threatened to be denied on account of sex. The concept of tangible job benefit includes, but is not limited to, the employee being terminated, fired, or demoted. Constructive discharge also constitutes a loss of a tangible job benefit. Constructive discharge in a sexual harassment case involves

the employee choosing to leave the employment because of the sexual harassment. In a case involving constructive discharge, the jury should first answer an interrogatory on whether constructive discharge occurred. See OJI-CV 533.23, which describes constructive discharge as a forced separation. If constructive discharge occurred, further interrogatories may inquire as to whether the additional elements of this claim are present. If constructive discharge is not present, and no other tangible job benefit was lost or threatened, then this form of sexual harassment claim cannot be maintained. While the Committee takes no position, at least one Court has determined that a constructive discharge is not a denial of a tangible job benefit if it was caused by co-workers and not ratified or approved by supervisors. *Caridad v. Metro-North Commuter Railroad* (C.A. 2, 1999), 191 F.3d 283, 294-95, cert. den. (2000) 120 S.Ct. 1959.

If sexual harassment is committed by a peer, or lower level employee, then the employer can only be liable on the basis of the liability defined in the instruction on hostile work environment, which is a separate claim. See OJI-CV 533.17.

1. GENERAL. The employee claims that (*insert name[s] of defendant[s]*) engaged in sexual harassment. To prove sexual harassment, the employee must prove by the greater weight of the evidence that

(A) (*insert name[s] of defendant[s]*)

(*Use appropriate alternative[s]*)

(1) gave or promised to give a tangible job benefit in exchange for submission to unwelcome sexual demands;

(*or*)

(2) penalized or threatened to penalize the employee for refusing to submit to unwelcome sexual demands;

and

(B) (*insert name[s] of defendant[s]*) had the (actual) (apparent) authority to (give tangible job benefits) (penalize the employee) (hire) (fire) (set working hours).

2. SEXUAL HARASSMENT. "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.

COMMENT

Drawn from OAC 4112-5-05(J)(1).

3. KNOWLEDGE OF EMPLOYER. The employee does not need to prove that the employer had knowledge of the harassment to prevail on this form of sexual

harassment. The employee must, however, prove actual or apparent authority of (*insert name[s] of defendant[s]*) had the (actual) (apparent) authority to (give tangible job benefits) (penalize the employee) (hire) (fire) (set working hours).

COMMENT

The "authority" referred to in Section 3 may be "actual" or "apparent." The court may want to further instruct the jury on the type of authority at issue.

4. ACTUAL AUTHORITY. OJI-CV 423.01 § 4.

5. APPARENT AUTHORITY. OJI-CV 423.01 § 10.

COMMENT

Highlander v. KFC National Management (C.A. 6, 1986), 805 F.2d 644.

6. EMPLOYER LIABILITY FOR SEXUAL HARRASSMENT BY A SUPERVISOR (WITH LOSS OF TANGIBLE JOB BENEFITS). The employer is liable for the conduct of (*insert name[s] of defendant[s]*) if the conduct occurred in the scope of employment of (*insert name[s] of defendant[s]*).

Where an employee is able to sexually harass another employee because of the authority vested in him/her by the employer, then the harassment took place within the scope of his/her employment. As an example, where the harassment took place during working hours, at the office, and was carried out by someone with the authority to hire, fire, promote or discipline the employee, the conduct is within the scope of the harasser's employment, when the authority was used to make the employee feel that he/she had to endure the harassment to keep the job. If you find by the greater weight of the evidence that (*insert name[s] of defendant[s]*) completed acts of sexual harassment within the scope of his/her employment, then you may find the employer liable for the conduct.

COMMENT

Kerans v. Porter Paint Co. (1991), 61 Ohio St.3d 486, 490-91.

CV 533.17 Sexual harassment-hostile work environment *[Rev. 3-28-09]*

1. GENERAL. The employee claims that he/she has been subjected to a hostile work environment because of sexual harassment. To establish a claim of hostile work environment sexual harassment, the employee must prove by the greater weight of the

evidence that he/she was sexually harassed and that the sexual harassment was so severe or (pervasive) (extensive) that it permeated the work environment and altered the conditions of the employee's employment.

2. SEXUAL HARASSMENT. "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, or other unwelcome verbal or physical conduct of a sexual nature.

COMMENT

Drawn from OAC 4112-5-05 (J) (1).

3. FACTORS. In deciding whether the claimed sexual harassment created a hostile work environment, you may consider all of the following factors:

(A) the physical environment of the employee's work area;

(B) the reasonable expectations of the employee upon entering the work environment;

(C) the nature of the unwelcome sexual acts or words;

(D) the sexual acts or words occurred one time or repeatedly;

(E) the seriousness of the conduct;

(F) the context in which the sexual harassment occurred;

(G) whether the conduct was verbal, physical or both;

(H) whether it was merely an isolated utterance;

(I) whether it unreasonably interfered with the employee's work performance;

(J) the alleged harasser was a co-worker or supervisor;

(K) others joined in the harassment; and

(L) the harassment was directed at more than one person.

COMMENT

Harris v. Forklift Systems (1993), 510 U.S. 17; *Meritor Savings Bank v. Vinson* (1986), 477 U.S. 57.

These instructions can be adapted to cases alleging a hostile work environment based on race, retaliation, or other legally protected classifications.

4. REASONABLE PERSON STANDARD. In deciding whether a hostile work environment existed, you must consider the evidence from the point of view of a

reasonable person in the same or similar circumstances. You must evaluate all of the circumstances and determine whether the alleged harassing behavior is the kind of behavior that would create a hostile work environment for a reasonable person. You should not consider the evidence from the point of view of an overly sensitive person. The employee must also believe that he/she was subjected to a hostile work environment.

COMMENT

Harris v. Forklift Systems (1993), 510 U.S. 17.

The Committee takes no position on whether the sex of the employee should be considered in deciding what a reasonable person's reaction would be. *Ellison v. Brady* (C.A. 9, 1991), 924 F.2d 872.

5. EMPLOYER LIABILITY FOR SEXUAL HARASSMENT WITHOUT LOSS OF TANGIBLE JOB BENEFIT. An employer may be liable for failing to take corrective action against another employee who created a hostile work environment for the employee. You shall find the employer liable if you find by the greater weight of the evidence that the employee has been subjected to hostile work environment sexual harassment and

(*Use appropriate alternative[s]*)

(A) (*insert name of alleged harasser*) has a past history of sexually harassing behavior about which the employer knew or should have known and the employer failed to take prompt or effective remedial action.

(*or*)

(B) the employer knew or should have known about the harassment against the employee and the employer failed to take prompt or effective remedial action.

COMMENT

Kerans v. Porter Paint Co. (1991), 61 Ohio St.3d 486; *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). *Cf.* 266.17(6) dealing with employer vicarious liability for sexual harassment with a loss of tangible job benefit.

For cases involving sexual harassment by a non-employee, see OAC 4112-5-05(J)(5); *Anania v. Daubenspeck Chiropractic* (2d Dist. 1998), 129 Ohio App.3d 516; *Gliatta v. Tectum, Inc.*, 211 F.Supp.2d 992, 1002 (S.D. Ohio 2002).

6. AFFIRMATIVE DEFENSE-CORRECTIVE ACTION.

(A) GENERAL. OJI-CV 303.03 § 4.

(B) CORRECTIVE ACTION. The employer claims that he/she/it is not liable to the employee. If the employer proves by the greater weight of the evidence that: (a) the employer exercised reasonable care to prevent and correct any sexually harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

COMMENT

This is an affirmative defense for the employer which applies only to cases in which no tangible employment action, such as discharge, demotion, or undesirable reassignment, occurs. See *Faragher v. City of Boca Raton* (1998), 524 U.S. 775; *Burlington Industries, Inc. v. Ellerth* (1998), 524 U.S. 742.

CV 533.19 Retaliation *[Rev. 3-22-03]*

1. GENERAL. An employer may not retaliate against an employee who (opposed any unlawful discriminatory practice) ([made a charge] [testified] [assisted] [participated in any manner] in any investigation, proceeding, or hearing concerning discrimination) (*insert other protected conduct*). The employee must prove by the greater weight of the evidence that the employer intended to retaliate when he/she/it (*insert challenged job action*). The employee need not prove that the sole purpose of (*insert challenged job action*) was retaliation. It is sufficient that the employee prove that retaliation was a determining factor in (*insert challenged job action*).

COMMENT

R.C. 4112.02(I); *Cooper v. City of North Olmsted* (C.A. 6, 1986), 795 F.2d 1265; *Jackson v. RKO Bottlers of Toledo, Inc.* (C.A. 6, 1984), 743 F.2d 370, 375.

2. DETERMINING FACTOR. "Determining factor" means that the employee's (*insert protected conduct*) made a difference in the (*describe challenged conduct*). There may be more than one reason for the employer's decision to (*describe challenged conduct*). The employee need not prove that (*insert protected conduct*) was the only reason. It is not a determining factor if the employee would have been (*describe challenged conduct*) regardless of his/her (*insert protected conduct*).

COMMENT

Cleveland Civil Service Comm. v. Ohio Civil Rights Comm. (1991), 57 Ohio St.3d 62; *Plumbers & Steamfitters v. Ohio Civil Rights Comm.* (1981), 66 Ohio St.2d 192, 198-199. See also *St. Mary's Honor Center v. Hicks* (1993), 509 U.S.

502 (the action complained of must be done because of intentional discrimination).

3. REASONABLE BELIEF. The employee must have a reasonable belief that the employer engaged in a discriminatory employment practice before the employee (*insert protected conduct*), whether or not the employer did, in fact, engage in a discriminatory employment practice. The issue is not whether the employer actually engaged in a discriminatory employment practice. "Reasonable belief" means that belief which would be held by a reasonably (cautious) (careful) (prudent) person under the same or similar circumstances.

COMMENT

The Committee believes that the objective standard of reasonableness is required under the syllabus in *Fox v. City of Bowling Green*, 76 Ohio St.3d 534, 1996-Ohio-104.

4. KNOWLEDGE (OPTIONAL). The employer must have had knowledge that the employee (*insert protected conduct*) before the employer (*describe challenged conduct*).

5. AGENCY. OJI-CV 423.01.

COMMENT

In a claim of retaliation by a co-employee of an equal standing, not a supervisor, where an employer fails to protect the employee, refer to OJI-CV 533.17 § 5. Where there is a question of whether the employer is liable for the act of a co-employee or whether the employer is charged with knowledge, the court must instruct on agency. See OJI-CV 423.01.

6. AFFIRMATIVE DEFENSE-CORRECTIVE ACTION.

(A) GENERAL. OJI-CV 303.03 § 4.

(B) CORRECTIVE ACTION. The employer claims that the employee unreasonably failed to take advantage of reasonable preventive or corrective opportunities. If you find by the greater weight of the evidence that

(1) the employer exercised reasonable care to prevent and correct any retaliatory behavior; and

(2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm,

then you must find in favor of the employer.

COMMENT

Strouss v. Mich. Dept. of Corrections (C.A. 6, 2001), 250 F.3d 336, 342-43.

(Text continued on page 579)

CV 533.21 Additional affirmative defenses *[Rev. 3-22-03]*

1. GENERAL. OJI-CV 303.03 § 4.

2. BONA FIDE SENIORITY SYSTEM (AGE DISCRIMINATION CLAIMS ONLY). The employer claims that the treatment of the employee was in accordance with terms of a bona fide seniority system. If you find by the greater weight of the evidence that the employer

(A) established a seniority system which used length of service as the primary factor for (layoffs) (promotions) (*insert other challenged action*); and

(B) the system was implemented and operated in a non-discriminatory manner,

then you must find in favor of the employer.

COMMENT

29 U.S.C. 622 (f) (2); *Morelock v. NCR Corp.* (C.A. 6, 1978), 586 F.2d 1096.

3. BONA FIDE OCCUPATIONAL QUALIFICATION. The employer claims that (race) (color) (religion) (sex) (pregnancy) (national origin) (age) (ancestry) (*other legally protected classification*) was part of a bona fide occupational qualification. If you find by the greater weight of the evidence that it is essential and necessary to the business that a person of a particular (race) (color) (religion) (sex) (national origin) (age) (ancestry) (*other legally protected classification including pregnancy*) be employed; and

(*Use appropriate alternative[s]*)

(A) the employer had a factual basis for believing that all members of the excluded group would be unable to perform safely and efficiently the duties of the job involved,

(*or*)

(B) it was impossible or impracticable to make a determination of each person's qualifications in a non-discriminatory manner,

then you must find in favor of the employer.

COMMENT

Little Forest Medical Ctr. of Akron v. Ohio Civil Rights Comm. (1991), 61 Ohio St.3d 607.

CV 533.23 Constructive discharge *[Rev. 3-22-03]*

COMMENT

This instruction applies in discrimination cases where the employee also claims that he/she was forced to resign or leave due, in whole or in part, to discriminatory employment practices. "Constructive discharge" is not an independent claim for relief.

1. GENERAL. The employee (resigned) (left his/her job) and claims that he/she was constructively discharged by the employer. The employer claims that the employee voluntarily (resigned) (left the job). If you find by the greater weight of the evidence that the employer, regardless of his/her/its intent, made the employee's working conditions so difficult and unpleasant that a reasonably (cautious) (careful) (prudent) person under the same or similar circumstances would feel compelled to resign or leave employment, then you must find that the employee was constructively discharged.

COMMENT

Mauzy v. Kelly Services, Inc., 75 Ohio St.3d 578, 1996-Ohio-265; *United Parcel Serv. v. Ohio Civil Rights Comm.* (1991), 71 Ohio App.3d 146; *Scandinavian Health Spa, Inc. v. Ohio Civil Rights Comm.* (1990), 64 Ohio App.3d 480.

CV 533.25 Damages in discrimination cases *[Rev. 3-22-03]*

COMMENT

R.C. 4112.99 provides, "Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief."

1. BACK PAY. If you find for the employee, he/she is entitled to recover lost wages and benefits, including any increases in wages or benefits lost because of (discrimination) (retaliation). The amount of wages and benefits due is determined by calculating the amount that would have been earned from the date of the (*insert challenged job action*) to the present. You may include all forms of compensation that the employee proved he/she would have earned, but for (*insert challenged job action*), including salary, bonuses, vacation pay, pension, health insurance and other benefits. (In determining the amount of any back pay, you must deduct the amount of wages and benefits received from replacement income during the period of back pay awarded.)

2. FRONT PAY.

COMMENT

As to front pay, reinstatement is the preferred remedy, if appropriate. Reinstatement is an equitable remedy in the discretion of the trial court. Absent an agreement between the parties concerning reinstatement, the court may wish to have the issue of front pay decided by the jury before making any decision about reinstatement.

If you find for the employee, you shall consider an award of front pay. Front pay includes the amount the employee would have earned from the date of the verdict until the date you find the Employee's loss of future pay and benefits will cease. The purpose of front pay is to temporarily compensate the employee while he/she seeks comparable employment and not to give long-term compensation from the present to retirement. Among the factors to be considered in deciding the amount of front pay are the following:

(A) the age of the employee and his/her reasonable prospects of obtaining comparable employment elsewhere;

(B) salary and (*specify other tangible benefits such as bonuses and vacation pay*);

(C) expenses associated with finding new employment; and

(D) the replacement value of fringe benefits until comparable fringe benefits are obtained or for a reasonable length of time.

In determining the amount of front pay, you must deduct the amount of wages and benefits you believe will be received from replacement income during the period of front pay awarded.

COMMENT

Worrell v. Multipress, Inc. (1989), 45 Ohio St.3d 241, 246.

While the damages must be proven with reasonable certainty, the employee is not required to prove with unrealistic precision the amount of lost earnings, if any, due him/her. Any uncertainties in the amount employee could have earned should be resolved against the employer. *Ohio Civil Rights Comm. v. Ingram*, 69 Ohio St.3d 89, 1994-Ohio-515.

3. COMPENSATORY DAMAGES.

COMMENT

Elek v. Huntington National Bank (1991), 60 Ohio St.3d 135, 137; *Keys v.*

U.S. Welding, Fabricating and Mfg. (N.D.Ohio 1992), 1992 U.S. Dist. LEXIS 13197; "EEOC Policy Guidelines on Damages Provisions of the 1991 Civil Rights Act," 8 *FEP Manual* 405:7091.

(A) GENERAL. If you find for the employee, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the employee for the actual (injury) (damage) proximately caused by the conduct of the employer.

(B) CONSIDERATION. In deciding this amount, if any, you will consider the nature, character, seriousness and duration of any (emotional pain) (suffering) (inconvenience) (mental anguish) (loss of enjoyment of life) the employee may have experienced.

(C) FUTURE OR PERMANENT INJURY AND EXPENSE. The employee also claims that (he/she will experience emotional [pain] [suffering] [inconvenience] [mental anguish] in the future) (the emotional [pain] [suffering] [inconvenience] [mental anguish] [loss of enjoyment of life] is permanent) (he/she will incur future expense). You may not return a verdict for any (future) (permanent) injury or damages unless you find by the greater weight of the evidence that the injury or damages are reasonably certain to occur and were the proximate result of the employer's conduct.

COMMENT

Ohio courts have not decided whether, in discrimination cases, future hedonic damages, commonly referred to as damages for loss of enjoyment of life, may be awarded in cases involving non-permanent emotional injuries. See *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St.3d 601, 1992-Ohio-138.

(D) SPECULATION. You are not to speculate about (permanent) (future) damages. The law deals in probabilities and not mere possibilities. In deciding (permanent) (future) damages, you may consider only those things that you find from the evidence are reasonably certain to continue.

(E) OTHER DAMAGES. OJI-CV Chapter 315.

(F) REASONABLY CERTAIN. "Reasonably certain" means probable, that is, more likely to occur than not.

COMMENT

Drawn from *State v. Holt* (1969), 17 Ohio St.2d 81.

(G) LOSS OF ABILITY TO PERFORM USUAL FUNCTIONS—PERMANENT DISABILITY. OJI-CV 315.01 § 4.

4. PUNITIVE DAMAGES. OJI-CV 315.37.

COMMENT

Punitive damages may be available upon a showing of actual malice. *Rice v. Certainteed Corp.*, 84 Ohio St.3d 417, 1999-Ohio-361. Punitive damages require proof by clear and convincing evidence.

5. FAILURE TO MITIGATE. The employee has a duty to use reasonable diligence to find comparable employment. If the employer proves by the greater weight of the evidence that (comparable employment was passed up by) (the employee failed to use reasonable diligence to find employment and that comparable employment was available to) the employee, then you must subtract the amount of pay that the employee should have earned from any award of back pay or front pay. Comparable employment need not be identical in responsibility or compensation but must be a type of work that a reasonable person would take if in the position of the employee.

COMMENT

See *Rasimas v. Michigan Dept. of Mental Health* (C.A. 6, 1983), 714 F.2d 614.

Chapter CV 537

EMPLOYMENT RELATIONS

CV 537.01 Contract of employment *[Rev. 12/7/19]*

CV 537.03 Contract of employment—promissory estoppel *[Rev. 12/7/19]*

CV 537.05 Liability to third parties: contracts *[Rev. 12/7/19]*

CV 537.07 Liability to third parties: torts *[Rev. 12/7/19]*

CV 537.09 Employer intentional tort: employee injury, disease, condition, or death *[Rev. 12/7/19]*

CV 537.11 Trade secrets *[Rev. 6/27/20]*

CV 537.13 Labor-management disputes *[Rev. 12/7/19]*

CV 537.15 Liability to employees: breach of contract and duty of fair representation *[Rev. 12/7/19]*

CV 537.17 Wrongful discharge; public policy tort *[Rev. 12/7/19]*

CV 537.01 Contract of employment *[Rev. 12/7/19]*

COMMENT

Because the employment relationship is a contractual relationship, *see, e.g.*, *Phung v. Waste Mgt., Inc.*, 23 Ohio St.3d 100 (1986) (overruled on other grounds), instructions on the typical contract issues of offer, acceptance, consideration, interpretation, and modification may be adapted for use in the employment context. *See* OJI-CV Chapter 501.

For claims involving discrimination see OJI-CV Chapter 533. *See also* R.C. 4112.02; R.C. 4112.14. "A clear reading of [former section R.C. 4101.17] indicates that it was enacted by the General Assembly in order to permit a civil cause of action for aggrieved employees to redress claims of age discrimination." *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501 (1991).

1. GENERAL. The state of Ohio follows the at-will employment doctrine that recognizes an employer's right to discharge an at-will employee so long as it is not otherwise prohibited by law. Although the employment relationship is a contractual relationship, the employer and employee are free to end the employment relationship at any time unless the employee proves that he/she agreed to a definite term of employment or that the employee could be discharged only for just cause.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the parties entered into (an oral) (a written) contract of employment whereby (*describe employment relationship*); and

(B) the defendant breached the employment contract by (*insert nature of breach[es] claimed by the plaintiff*); and

(C) the defendant's breach caused the plaintiff to incur (injuries) (damages) (loss).

3. DURATION: DEFINITE TERM OF EMPLOYMENT (ADDITIONAL). The plaintiff claims that he/she and the defendant agreed that the plaintiff would work for the defendant for (*describe period of time*). If the plaintiff fails to prove by the greater weight of the evidence the agreement to work for a definite period of time, then both the plaintiff and the defendant had the right to end the employment relationship at any time.

4. DURATION: DISCHARGE FOR JUST CAUSE (ADDITIONAL). The plaintiff claims that he/she could only be discharged for just cause. If the plaintiff fails to prove by the greater weight of the evidence that he/she could only be discharged for just cause, then the defendant had the right to end the employment relationship without just cause.

COMMENT

"The character of the employment, custom, the course of dealing between the parties, or other facts which may throw light upon the question can be considered by the jury in order to determine the parties' intent. Employee handbooks, company policy, and oral representations have been recognized in some situations as comprising components or evidence of the employment contract." *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100 (1985).

5. TERMINATION FOR CAUSE (ADDITIONAL). If you find that the defendant could terminate the employment of the plaintiff only for just cause, then you must determine whether the defendant had just cause to discharge the plaintiff. You will find for the plaintiff if you find by the greater weight of the evidence that the defendant did not have just cause to discharge the plaintiff.

COMMENT

Mers v. Dispatch Printing, 19 Ohio St.3d 100 (1985).

6. JUST CAUSE (ADDITIONAL). Just cause is a default in an employee's performance of his/her duty, the natural tendency of which is to injure the employer's business, even if it does not result in actual (injury) (damage) to the business. Neglect of duty, insubordination, and/or disloyalty are just cause for discharge.

COMMENT

Drawn from *McElroy v. Snider Co.*, 8th Dist. Cuyahoga No. 76418, (Jun. 29,

(Text continued on page 587)

2000), 2000 Ohio App. LEXIS 2918, relying on *Beckman v. Garrett*, 66 Ohio St. 136 (1902) and *Dayton Rubber Mfg. Co. v. Brown*, 116 Ohio St. 373 (1927).

7. DAMAGES. OJI-CV Chapter 315.

CV 537.03 Contract of employment—promissory estoppel *[Rev. 12/7/19]*

COMMENT

Promissory estoppel can be used to modify an employment contract of indefinite duration or contract "at-will." *Helle v. Landmark, Inc.*, 15 Ohio App.3d 1 (6th Dist.1984); *Hedrick v. Ctr. for Comprehensive Alcoholism Treatment*, 7 Ohio App.3d 211 (1st Dist.1982).

Because the employment relationship is a contractual relationship, *see, e.g.*, *Phung v. Waste Mgt., Inc.*, 23 Ohio St.3d 100 (1986) (overruled on other grounds), instructions on the typical contract issues of offer, acceptance, consideration, interpretation, and modification may be adapted for use in the employment context. *See* OJI-CV Chapter 501.

For claims involving discrimination see OJI-CV Chapter 533. *See also* R.C. 4112.02; R.C. 4112.14. "A clear reading of [former section R.C. 4101.17] indicates that it was enacted by the General Assembly in order to permit a civil cause of action for aggrieved employees to redress claims of age discrimination." *Kohmescher v. Kroger Co.*, 61 Ohio St.3d 501 (1991).

1. GENERAL. The plaintiff claims that the defendant is (prevented) (estopped) from denying the contract of employment based on promissory estoppel.

2. PROOF OF CLAIM. Before you can find for the plaintiff you must find by the greater weight of the evidence that

(A) the defendant promised the plaintiff (*describe the promise*); and

(B) the defendant should have reasonably expected that the plaintiff would (act) (fail to act) in reliance on that promise; and

(C) the plaintiff did (act) (fail to act) (*describe act or forbearance*) in reliance on the defendant's promise; and

(D) the plaintiff's reliance was to his/her detriment and injustice can be avoided only by enforcement of the promise.

COMMENT

"The character of the employment, custom, the course of dealing between the parties, or other facts which may throw light upon the question can be considered by the jury in order to determine the parties' intent. Employee handbooks, company policy, and oral representations have been recognized in some situations as comprising components or evidence of the employment contract." *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100 (1985).

"Promissory estoppel" is "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." 1 Restatement of the Law 2d, Contracts, Section 90 (1981).

3. DAMAGES. OJI-CV Chapter 315.

CV 537.05 Liability to third parties: contracts *[Rev. 12/7/19]*

1. GENERAL. The plaintiff claims that (*insert name of employee*) was an employee of the defendant and that (*insert name of employee*) entered into a contract with him/her/it (to) (for) (*describe subject matter of contract*). An employer is bound by (contracts made) (contracts broken) (*describe other action taken*) on his/her/its behalf by an employee acting within the scope of the employee's authority.

2. PROOF OF CLAIM. Before you can find for the plaintiff you must find, by the greater weight of the evidence that

(*Use appropriate alternative*)

(A) (*insert name of employee*) was an employee of the defendant and was acting within the scope of his/her express authority.

(*or*)

(B) (*insert name of employee*) was an employee of the defendant and was acting within the scope of his/her apparent authority.

(*or*)

(C) the defendant is (prevented) (estopped) from denying the contract based on promissory estoppel.

(*or*)

(D) the defendant ratified the unauthorized acts of his/her/its employee.

3. EMPLOYEE. (ADDITIONAL). A person is an employee if the employer reserves the right to control the manner or means of doing the work. The factors to consider include, but are not limited to: who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools, and personnel used; who selects the routes travelled; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts.

COMMENT

Drawn from *Bostic v. Connor*, 37 Ohio St.3d 144 (1988).

4. EXPRESS AUTHORITY (ADDITIONAL). "Express authority" is that authority that is directly granted to or conferred upon the employee in express terms by the employer, and extends only to such authority as the employer gives the employee in direct terms.

COMMENT

Master Consol. Corp v. Bancohio Natl Bank, 61 Ohio St.3d 570 (1991).

5. APPARENT AUTHORITY (ADDITIONAL). "Apparent authority" is the power to affect the employer's legal relations by transactions with third persons arising from the employer's representations to third persons. Under a theory of apparent authority, evidence must show that

(A) the employer held the employee out to the public as possessing sufficient authority to embrace the act in question or knowingly permitted him/her to act as having such authority; and

(B) the person dealing with the employee knew of this fact and, acting in good faith, had reason to believe and did believe that the employee possessed the necessary authority. The apparent authority of an employee is to be determined by the act(s) of the employer and not by the act(s) of the employee.

COMMENT

Master Consol. Corp v. Bancohio Natl Bank, 61 Ohio St.3d 570 (1991).

6. AGENCY BY ESTOPPEL. OJI-CV 423.01.

COMMENT

Estoppel has so many applications that the instruction may have to be tailored to the issues in evidence. For instance, an estoppel may be caused by an innocent but positive misrepresentation or by failure to act when a person knows the plaintiff is changing his position in reliance on a mistaken belief. *See* Prosser, Law of Torts (4 Ed.1971) 691–693. The foregoing instruction is drawn from *Councell v. Douglas*, 163 Ohio St. 292 (1955); *Rubbo v. Hughes Provision Co.*, 138 Ohio St. 178 (1941), and 1 Restatement of the Law 2d, Agency, Sections 8, 8B, and 141 (1957).

7. PROMISSORY ESTOPPEL. OJI-CV 501.31.

8. RATIFICATION. Ratification occurs when the employer conducts himself/herself/itself in such a manner that shows his/her/its intention to accept an unauthorized transaction. Ratification by an employer cannot occur unless the employer has full knowledge and understanding of the acts performed by his/her/its employee. An unauthorized act may, by implication, be ratified through the acceptance of the benefits of such act.

COMMENT

Bernardo v. Anello, 61 Ohio App.3d 453 (8th Dist.1988).

9. DAMAGES. OJI-CV Chapter 315.

CV 537.07 Liability to third parties: torts *[Rev. 12/7/19]*

1. GENERAL. The plaintiff claims that (*insert name of employee*) was an employee of the defendant and that (*insert name of employee*) caused his/her/its (injury) (damage) while committing a tort. An employer is liable for the negligent acts of his/her/its employees acting within the scope of employment.

COMMENT

Generally, an employer is not liable for the negligent act of an independent contractor. The employer is liable for the negligent act of an independent contractor for non-delegable duties and if the work itself creates a danger to others. *Strayer v. Lindeman*, 68 Ohio St.2d 32 (1981); *Pusey v. Bator*, 94 Ohio St.3d 275, 2002-Ohio-795. If there is an issue if the person is an employee or an independent contractor, a separate instruction will be necessary. *See also* OJI-CV 423.13.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) (*insert name of employee*) was an employee of the defendant; and

(B) (*insert name of employee*) was acting within the scope of employment; and

(C) the employee acted negligently; and

(D) the employee's negligence proximately caused the plaintiff's (injury) (damage).

3. EMPLOYEE (ADDITIONAL). OJI-CV 537.03.

4. SCOPE OF EMPLOYMENT. The act is within the scope of employment when the act can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of the service to be rendered, or a natural, direct, and logical result of it.

COMMENT

Posin v. *A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271 (1976).

5. DEPARTURE FROM SCOPE OF EMPLOYMENT (ADDITIONAL). An employee who departs from his/her employment to engage in affairs of his/her own relieves the employer from liability for his/her acts. Not every deviation from the strict course of duty is a departure that will relieve an employer of liability. An employee, while acting in the scope of employment, incidentally does something for himself/

herself or a third person, does not automatically relieve the employer from liability for negligence that causes injury to another. To sever the employee from the scope of employment, the act complained of must be such a divergence from the employee's regular duties that its very character severs the relationship.

COMMENT

Posin v. A.B.C. Motor Court Hotel, Inc., 45 Ohio St.2d 271 (1976); *Amstutz v. Prudential Ins. Co.*, 136 Ohio St. 404 (1940).

6. INDEPENDENT CONTRACTOR (ADDITIONAL). OJI-CV 423.13.

7. SECOND EMPLOYER/LOANED EMPLOYEE (ADDITIONAL). An employee may be loaned to a second employer. The loaned employee becomes an employee of the second employer if the second employer reserves the right to control the manner or means of doing the work. The factors to consider include, but are not limited to, who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools, and personnel used; who selects the routes travelled; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts.

COMMENT

Giovinale v. Republic Steel Corp., 151 Ohio St. 161 (1949); *Ragone v. Vitali & Beltrami, Jr., Inc.*, 42 Ohio St.2d 161 (1975).

"A continuation of the general employment is indicated by the fact that the general employer can properly substitute another servant at any time, that the time of the new employment is short, and that the lent servant has the skill of a specialist." 1 Restatement of the Law 2d, Agency, Section 227 (2010).

8. NEGLIGENCE. OJI-CV Chapter 401.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

CV 537.09 Employer intentional tort: employee injury, disease, condition, or death *[Rev. 12/7/19]*

COMMENT

The Committee did not edit the instructions for employer intentional torts arising before 4/9/03, or on and after 4/9/03, but before 4/7/05, because the two-year statute of limitations on these claims for relief has expired. If the court believes that the statute of limitations has been equitably tolled or extended, see Ohio Jury Instructions Archive.

1. GENERAL. The plaintiff claims that the (*describe [injury] [disease] [condition] [death]*) was caused by the intentional or deliberate conduct of the defendant.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the plaintiff was an employee of the defendant acting in the course of his/her employment;

(B) the plaintiff's (injury) (disease) (condition) (death) was proximately caused by the defendant's conduct; and

(C) the defendant committed an act or omission with the intent to (injure) (harm) the plaintiff or with the knowledge or belief that the (injury) (harm) to the plaintiff was substantially certain to occur.

COMMENT

Drawn from R.C. 2745.01.

Because of the immunity conferred by R.C. 4123.74 and Article II, Section 35, Ohio Constitution, for the vast majority of workplace injuries, a workers' compensation claim is an employee's exclusive remedy. But when an act or omission is committed by the employer with the intent to injure, the claim arises outside of the employment relationship and the workers' compensation system does not preempt the employee's claim for relief. *Cincinnati Ins. Co. v. DTJ Enters. (In re Hoyle)*, 143 Ohio St.3d 197, 2015-Ohio-843, citing *Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624 (1991).

For workers' compensation claims, see OJI-CV 427.01.

3. SUBSTANTIALLY CERTAIN. "Substantially certain" means that the defendant acted with deliberate intent to cause the plaintiff's (injury) (disease) (condition) (death).

COMMENT

Drawn from R.C. 2745.01.

While this section does not eliminate the common law claim for relief for an employer intentional tort, it supersedes and replaces the definition of "substantially certain" recognized prior to 4/7/05. *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027; *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, *effectively overruling Fyffe v. Jeno's, Inc.*, 59 Ohio St.3d 115 (1991); *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100 (1988).

The various employment claims set forth in R.C. 2745.01(D), which include, among others, discrimination, sexual harassment, civil rights violations, and retaliation, are unaffected by the General Assembly's limitations on employer intentional torts. *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029.

4. DELIBERATE REMOVAL OR MISREPRESENTATION (ADDITIONAL). If you find that the defendant deliberately (removed an equipment safety guard) (misrepresented a toxic or hazardous substance), you may but are not required to find that the (removal) (misrepresentation) was committed with the intent to (injure) (harm) if the (injury) (disease) (condition) (death) occurred as a direct result of the deliberate (removal) (misrepresentation).

COMMENT

Drawn from R.C. 2745.01(C), OJI-CV 309.01 and OJI-CV 309.03.

5. DELIBERATE REMOVAL OF AN EQUIPMENT SAFETY GUARD. "Deliberate removal of an equipment safety guard" means that the defendant made a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine.

COMMENT

Drawn from *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, adopting the definitions contained in *Fickle v. Conversion Techs. Int'l, Inc.*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960.

6. EQUIPMENT SAFETY GUARD. "Equipment safety guard" means a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment.

COMMENT

Drawn from *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, adopting the definitions contained in *Fickle v. Conversion Techs. Int'l, Inc.*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960.

7. AFFIRMATIVE DEFENSE:

(A) CONTRIBUTORY FAULT. OJI-CV 403.01.

COMMENT

R.C. 2307.23(C), which provides for the apportionment of damages to non-parties, applies to employer intentional torts. If the employer's conduct is onsite, the court must also reduce any award to the plaintiff based on the plaintiff's "contributory fault" as defined in R.C. 2307.011(B), including the plaintiff's assumption of the risk. If the employer's conduct is offsite, the court must reduce the award only by the tortious conduct of non-parties, not by the contributory fault of the plaintiff. "Offsite" means on premises not owned, leased, or supervised by the employer. R.C. 2307.011(D); R.C. 2307.711(B)(1).

The trial judge must craft additional instructions if there is a dispute whether the employer's conduct is onsite or offsite.

(B) EXPRESS ASSUMPTION OF THE RISK. OJI-CV 403.09 § 1.

(C) IMPLIED ASSUMPTION OF THE RISK. OJI-CV 403.09 § 2.

8. INTRODUCTION TO INTERROGATORIES. OJI-CV 321.01.

9. INTERROGATORIES.

(A) DID THE DEFENDANT COMMIT AN ACT WITH THE INTENT TO (INJURE) (HARM) THE PLAINTIFF OR WITH THE KNOWLEDGE OR BELIEF THAT (INJURY) (HARM) TO THE PLAINTIFF WAS SUBSTANTIALLY CERTAIN TO OCCUR?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more jurors to (A) is "yes," move to Interrogatory (B). In answering the following Interrogatory (B) about whether the defendant's conduct was a direct and proximate cause of the plaintiff's (injury) (harm), only those jurors who answered "yes" to Interrogatory (A) are qualified to participate in answering Interrogatory (B).

COMMENT

Ohio follows the "same juror" rule. *O'Connell v. Chesapeake & Ohio RR. Co.*, 58 Ohio St.3d 226 (1991). The Committee believes that *O'Connell* establishes that only those jurors who find negligence may vote on proximate cause. *But see Dillon v. OhioHealth Corp.*, 10th Dist. Franklin Nos. 13AP-467 and 14AP-259, 2015-Ohio-1389, appeal not accepted, 144 Ohio St.3d 1407, 2015-Ohio-4947 (holding that "a juror who failed to find negligence was still able to determine proximate cause"); *see also Estate of Lawson v. Mercy Hosp. Fairfield*, 12th Dist. Butler No. CA2010-12-340, 2011-Ohio-4471 (holding that "standard of care and proximate cause of injury are not interdependent pursuant to the analysis provided in *O'Connell*, and therefore we do not invoke the 'same juror' rule herein").

(2) If the answer of (six) (three-fourths) or more jurors to (A) is "no," do not answer the remaining Interrogatories, sign the general verdict for the defendant, and report to the court that you have completed your deliberations.

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (A), report this to the court.

(B) WAS THE DEFENDANT'S ACT A PROXIMATE CAUSE OF ANY (INJURY) (HARM) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more jurors to (B) is "yes," move to Interrogatory (C).

(2) If the answer of (six) (three-fourths) or more jurors to (B) is "no," do not answer the remaining Interrogatories, sign the general verdict for the defendant, and report to the court that you have completed your deliberations.

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (B), report this to the court.

(C) (WAS THE PLAINTIFF NEGLIGENT?) (DID THE PLAINTIFF EXPRESSLY ASSUME THE RISK OF [INJURY] [HARM]?) (DID THE PLAINTIFF IMPLIEDLY ASSUME THE RISK OF [INJURY] [HARM]?) (DID THE PLAINTIFF [*describe other contributory tortious conduct*]?)

COMMENT

The trial court should not give Interrogatory (C) of this section if the employer's conduct occurred off site.

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more jurors to (C) is "yes," move to Interrogatory (D). In answering the following Interrogatory (D) about whether the plaintiff's conduct was a proximate cause of the plaintiff's (injury) (harm), only those jurors who answered "yes" to Interrogatory (C) are qualified to participate in answering Interrogatory (D).

(2) If the answer of (six) (three-fourths) or more jurors to (C) is "no," move to Interrogatory (E).

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (C), report this to the court.

(D) WAS THE PLAINTIFF'S (NEGLIGENCE) (EXPRESS ASSUMPTION OF

THE RISK) (IMPLIED ASSUMPTION OF THE RISK) (*describe other contributory tortious conduct*) A PROXIMATE CAUSE OF ANY (INJURY) (HARM) TO THE PLAINTIFF?

COMMENT

The trial court should not give Interrogatory (D) of this section if the employer's conduct occurred off site.

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more jurors to (D) is "yes" or "no" move to Interrogatory (E).

(2) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (D), report this to the court.

COMMENT

If there is more than one non-party, this interrogatory may have to be modified to accommodate multiple non-parties.

(E) WAS (*insert identity of non-party*)'S CONDUCT (NEGLIGENT) (*describe other contributory tortious conduct*)?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If the answer of (six) (three-fourths) or more jurors to (E) is "yes," move to Interrogatory (F). In answering the following Interrogatory (F) about whether the conduct of (*insert identity of non-party*) was a proximate cause of the plaintiff's (injury) (harm), only those jurors who answered "yes" to Interrogatory (E) are qualified to participate in answering Interrogatory (F).

(2) If the answer of (six) (three-fourths) or more jurors to (E) is "no," move to Interrogatory (G).

(3) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (E), report this to the court.

(F) WAS THE (NEGLIGENCE) (*describe other contributory tortious conduct*) OF (*insert identity of non-party*) A PROXIMATE CAUSE OF ANY (INJURY) (HARM) TO THE PLAINTIFF?

CIRCLE YOUR ANSWER IN INK	YES or NO
_____	_____
_____	_____
_____	_____
_____	_____

(1) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (F), report this to the court.

(2) If you have answered Interrogatory (F), move to Interrogatory (G).

(G)(1) In answering this Interrogatory about the percentages of (intentional) (substantially certain) conduct of the defendant, (negligence) (express assumption of the risk) (implied assumption of the risk) (*describe other contributory tortious conduct*) of the plaintiff, and the (negligence) (other tortious conduct) of (*insert identity of non-party*) that was a proximate cause of the plaintiff's (injury) (harm), select one of the following alternatives. The alternative you select will depend on your answers to the prior Interrogatories.

(A) THE PLAINTIFF, THE DEFENDANT, AND (*INSERT NAME OF NON-PARTY*) ARE RESPONSIBLE FOR THE PLAINTIFF'S (INJURY) (DISEASE) (CONDITION) (DEATH). If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), (D), (E), and (F), move to Interrogatory (G)(2). Only those jurors who answered "yes" to all six Interrogatories (A), (B), (C), (D), (E), and (F) are qualified to participate in answering Interrogatory (G)(2).

(B) ONLY THE PLAINTIFF AND THE DEFENDANT ARE RESPONSIBLE FOR THE PLAINTIFF'S (INJURY) (DISEASE) (CONDITION) (DEATH). If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (C), and (D), move to Interrogatory (G)(3). Only those jurors who answered "yes" to Interrogatories (A), (B), (C), and (D) are qualified to participate in answering Interrogatory (G)(3).

(C) ONLY THE DEFENDANT AND (*INSERT NAME OF NON-PARTY*) ARE RESPONSIBLE FOR THE PLAINTIFF'S (INJURY) (DISEASE) (CONDITION) (DEATH). If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A), (B), (E), and (F), move to Interrogatory (G)(4). Only those jurors who answered "yes" to Interrogatories (A), (B), (E), and (F) are qualified to participate in answering Interrogatory (G)(4).

(D) ONLY THE DEFENDANT IS RESPONSIBLE FOR THE PLAINTIFF'S (INJURY) (DISEASE) (CONDITION) (DEATH). If (six) (three-fourths) or more jurors answered "yes" to Interrogatories (A) and (B), move to Interrogatory (H).

(G)(2) STATE THE PERCENTAGES OF (NEGLIGENCE) (EXPRESS ASSUMP-

TION OF THE RISK) (IMPLIED ASSUMPTION OF THE RISK) (*describe other tortious conduct*) OF THE PLAINTIFF, THE (INTENTIONAL) (SUBSTANTIALLY CERTAIN) CONDUCT OF THE DEFENDANT, AND THE (NEGLIGENCE) (*describe other contributory tortious conduct*) OF NON-PARTIES THAT WAS A PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DISEASE) (CONDITION) (DEATH).

(a) ENTER PERCENTAGES.

COMMENT

If there is more than one non-party, this interrogatory may have to be modified to accommodate multiple non-parties.

(i) PERCENTAGE OF (NEGLIGENCE) (IMPLIED ASSUMPTION OF THE RISK) (*DESCRIBE OTHER CONTRIBUTORY TORTIOUS CONDUCT*) ATTRIBUTABLE TO THE PLAINTIFF:

_____%

(ii) PERCENTAGE OF (INTENTIONAL) (SUBSTANTIALLY CERTAIN) CONDUCT ATTRIBUTABLE TO THE DEFENDANT:

_____%

(iii) PERCENTAGE OF (NEGLIGENCE) (*DESCRIBE OTHER CONTRIBUTORY TORTIOUS CONDUCT*) ATTRIBUTABLE TO (*INSERT IDENTITY OF NON-PARTIES*):

_____%

The percentages attributable to the plaintiff, the defendant, and non-parties must equal 100%.

_____	_____
_____	_____
_____	_____
_____	_____

(b) If the percentage attributable to the plaintiff is 50% or less, move to Interrogatory (H), and all the jurors shall participate in the deliberations. Those jurors who agree shall sign the general verdict for the plaintiff.

(c) If the percentage attributable to the plaintiff is greater than 50%, do not answer Interrogatory (H). Those jurors who agree shall sign the general verdict for the defendant and report to the court that you have completed your deliberations.

(d) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (G)(2), report this to the court.

(G)(3) STATE THE PERCENTAGES OF (INTENTIONAL) (SUBSTANTIALLY

CERTAIN) CONDUCT OF THE DEFENDANT AND (NEGLIGENCE) (EXPRESS ASSUMPTION OF THE RISK) (IMPLIED ASSUMPTION OF THE RISK) (*DESCRIBE OTHER CONTRIBUTORY TORTIOUS CONDUCT*) OF THE PLAINTIFF THAT WAS A PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DISEASE) (CONDITION) (DEATH).

(a) ENTER PERCENTAGES.

COMMENT

If there is more than one non-party, this interrogatory may have to be modified to accommodate multiple non-parties.

(i) PERCENTAGE OF CONDUCT THAT WAS ATTRIBUTABLE TO THE DEFENDANT THAT WAS (INTENTIONAL) (SUBSTANTIALLY CERTAIN):

_____%

(ii) PERCENTAGE OF (NEGLIGENCE) (EXPRESS ASSUMPTION OF THE RISK) (IMPLIED ASSUMPTION OF THE RISK) (*DESCRIBE OTHER CONTRIBUTORY TORTIOUS CONDUCT*) ATTRIBUTABLE TO THE PLAINTIFF:

_____%

The percentages attributable to the plaintiff and the defendant must equal 100%.

_____	_____
_____	_____
_____	_____
_____	_____

(b) If the percentage attributable to the plaintiff is 50% or less,

(i) move to Interrogatory (H), and all the jurors shall participate in the deliberations, and

(ii) those jurors who agree shall sign the general verdict for the plaintiff.

(c) If the percentage attributable to the plaintiff is greater than 50%,

(i) do not answer Interrogatory (H), and

(ii) those jurors who agree shall sign the general verdict for the defendant, and

(iii) report to the court that you have completed your deliberations.

(d) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (G)(3), report this to the court.

(G)(4) STATE THE PERCENTAGES OF CONDUCT THAT WAS ATTRIBUTABLE TO THE DEFENDANT THAT WAS (INTENTIONAL) (SUBSTANTIALLY CERTAIN) AND (NEGLIGENCE) (*DESCRIBE OTHER CONTRIBU-*

TORY TORTIOUS CONDUCT) OF (*INSERT IDENTITY OF NON-PARTY*) THAT WAS A PROXIMATE CAUSE OF THE PLAINTIFF'S (INJURY) (DISEASE) (CONDITION) (DEATH).

(a) ENTER PERCENTAGES.

COMMENT

If there is more than one non-party, this interrogatory may have to be modified to accommodate multiple non-parties.

(i) PERCENTAGE OF CONDUCT THAT WAS ATTRIBUTABLE TO THE DEFENDANT THAT WAS (INTENTIONAL) (SUBSTANTIALLY CERTAIN):

_____%

(ii) PERCENTAGE OF (NEGLIGENCE) (*DESCRIBE OTHER CONTRIBUTORY TORTIOUS CONDUCT*) ATTRIBUTABLE TO THE NON-PARTIES:

_____%

The percentages attributable to the defendant and non-parties must equal 100%.

_____ _____
_____ _____
_____ _____
_____ _____

(b) move to Interrogatory (H), and all the jurors shall participate in the deliberations, and those jurors who agree shall sign the general verdict for the plaintiff.

(c) If (six) (three-fourths) jurors cannot agree on an answer to Interrogatory (G)(4), report this to the court.

(H) STATE THE TOTAL AMOUNT OF COMPENSATORY DAMAGES TO THE PLAINTIFF WITHOUT REGARD TO WHO IS AT FAULT.

STATE YOUR ANSWER NUMERICALLY IN INK $_____

_____ _____
_____ _____
_____ _____
_____ _____

COMMENT

The Committee believes that the court should emphasize to the jury that they should determine the amount of damages without regard to allocation of fault.

The Committee believes that because the issues relating to damages are

analytically different from those relating to causal negligence, the determination of damages may be made by all jurors without regard to their individual votes on causal negligence.

(I) PLEASE STATE THE FOLLOWING:

(1) THE AMOUNT OF THE COMPENSATORY DAMAGES THAT REPRESENTS ECONOMIC LOSS TO THE PLAINTIFF:

$_____

(2) THE AMOUNT OF THE COMPENSATORY DAMAGES THAT REPRESENTS NON-ECONOMIC LOSS TO THE PLAINTIFF:

$_____

_____	_____
_____	_____
_____	_____
_____	_____

COMMENT

The jury must distinguish between economic and non-economic damages. *See* OJI-CV 315.01. The distinction between economic and non-economic damages is significant, as different percentages of each may be recoverable against particular defendants, depending upon the allocation of liability. *See* R.C. 2307.22; R.C. 2307.23. Any resulting damages are further subject to the statutory caps contained in R.C. 2315.18.

10. CONCLUSION. OJI-CV Chapter 313.

11. PROXIMATE CAUSE. OJI-CV Chapter 405.

12. DAMAGES. OJI-CV 315.01.

13. PUNITIVE DAMAGES. OJI-CV 315.37.

CV 537.11 Trade secrets *[Rev. 6/27/20]*

1. GENERAL. The plaintiff claims that the defendant misappropriated the plaintiff's trade secret(s).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the information at issue was a trade secret; and

(B) the defendant misappropriated the plaintiff's trade secret by improper means; and

(C) the (plaintiff suffered actual loss proximately caused) (defendant was unjustly enriched) by the misappropriation.

COMMENT

Drawn from R.C. 1333.63(A).

3. TRADE SECRET. "Trade secret" means information, including the whole or any portion or phase of (any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement) (business information or plans) (financial information) (listing of names, addresses, or telephone numbers) (*describe other information*) that satisfies all of the following:

(A) the information derives independent economic value, actual or potential, from

(1) not being generally known to other persons who can obtain economic value from its (disclosure) (use); and

(2) not being readily ascertainable by proper means by other persons who can obtain economic value from its (disclosure) (use); and

(B) the information is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

COMMENT

Drawn from R.C. 1333.61; *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 1999-Ohio-260.

A plaintiff asserting trade secret status has the burden to identify and demonstrate that the material is included in categories of protected information recognized under R.C. 1333.61(D). *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 1997-Ohio-75.

4. TRADE SECRET FACTORS. In deciding whether the information at issue satisfies the definition of a "trade secret," you may consider any or all of the following factors:

(A) the extent to which the information is known outside of the business;

(B) the extent to which the information is known to those inside of the business, such as by the employees;

(C) the precautions taken by the plaintiff to guard the secrecy of the information;

(D) the value to the plaintiff in having exclusive possession of the information;

(E) the amount of effort or money expended in obtaining and developing the information; and

(F) the amount of time and expense it would take for others to acquire and duplicate the information.

COMMENT

Drawn from *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396,

2000-Ohio-207; *Pyromatics, Inc. v. Petruziello*, 7 Ohio App.3d 131 (8th Dist.1983).

The Committee believes that this is an exhaustive list of factors. *Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 2000-Ohio-207; *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 1997-Ohio-75.

The determination of whether a client list constitutes a trade secret does not depend on whether it has been memorized by a former employee, as information that constitutes a trade secret under Ohio law does not lose its character as a trade secret if it has been memorized. *Al Minor & Assocs. v. Martin*, 117 Ohio St.3d 58, 2008-Ohio-292 (upon certifying a conflict between the Eighth and Tenth Appellate Districts, the Supreme Court of Ohio followed the majority position of those states adopting the Uniform Trade Secret Act).

5. REASONABLE EFFORTS. The plaintiff is required only to take reasonable active steps under the circumstances to protect the trade secret(s). This does not require absolute secrecy or that the plaintiff use all conceivable efforts to maintain secrecy.

COMMENT

Drawn from Fred Siegel Co., L.P.A. v. *Arter & Hadden*, 85 Ohio St.3d 171, 1999-Ohio-260 (requiring that the possessor of a trade secret take "active steps" to maintain its secrecy).

Reasonable efforts to maintain secrecy include advising employees of the existence of a trade secret, limiting access to a trade secret with respect to the general public and competitors, employing security measures such as screening all visitors, requiring execution of confidentiality and/or non-disclosure agreements, labeling proprietary information "confidential," securing websites and password protecting servers, and controlling business and/or plant access. However, this list is non-exhaustive, and the reasonableness of the efforts is a question for the trier of fact. *Valco Cincinnati, Inc. v. N & D Machining Serv., Inc.*, 24 Ohio St.3d 41 (1986); *Niemi v. NHK Spring Co.*, 543 F.3d 294 (6th Cir. 2005).

6. COMBINATION (ADDITIONAL). If the information could be readily learned by legitimate methods, such as by reading publicly available literature or by examining publicly available products, or if the information is commonly known in an industry, no one may claim it as a trade secret. However, a trade secret can exist in a combination of characteristics and components, each of which, by itself, is commonly known or in the public domain. As long as the unified process, formula, or design, is unique and affords its owner a competitive advantage, it is a trade secret.

COMMENT

State ex rel. Plain Dealer v. Ohio Dept. of Ins., 80 Ohio St.3d 513, 1997-Ohio-75; *O.M.A. v. Simon DeYoung Corp.*, N.D. Ohio No. 1:10 CV 00861 (Feb. 14, 2014). This instruction should be given only if some components of the trade secret are commonly known or are in the public domain.

7. NEGATIVE INFORMATION (ADDITIONAL). A trade secret can also include

negative information that has commercial value, such as research results that prove that a certain process will not work.

COMMENT

Drawn from *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 2000-Ohio-207. This instruction should be given only if the trade secret constitutes research of the sort described.

8. USE NOT REQUIRED (ADDITIONAL). Information (possessed) (held) by a plaintiff who does not continuously use it, who has not yet had an opportunity to use it, or who has not acquired the means to use it, can nevertheless be a trade secret.

COMMENT

Drawn from *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 2000-Ohio-207. This instruction should be given only if the actual or continued use of the trade secret is at issue or if the plaintiff has not had or does not possess the means to use the information.

9. LIMITED DISCLOSURE (ADDITIONAL). A disclosure to third parties, including suppliers or vendors, for a limited purpose does not result in the loss of trade secret protection because the holder of a trade secret may disclose it to another in confidence and under an implied obligation not to use or disclose it.

COMMENT

Drawn from *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 1999-Ohio-260.

10. MISAPPROPRIATION. "Misappropriation" means the

(*Use appropriate alternative*)

(A) acquisition of another's trade secret by a person who knows or has reason to know that the trade secret was acquired by improper means;

(*or*)

(B) (disclosure) (use) of another's trade secret by a person who both lacked the express or implied consent of that other person and who

(*Use appropriate alternative[s]*)

(1) used improper means to acquire knowledge of the trade secret;

(*or*)

(2) knew or had reason to know, at the time of the (disclosure) (use), that the knowledge of the trade secret that the person acquired was (derived from or through a person who had utilized improper means to acquire it) (acquired under

circumstances giving rise to a duty to maintain its secrecy or limit its use) (derived from or through a person who owed a duty to the plaintiff to maintain its secrecy or limit its use);

(*or*)

(3) knew or had reason to know, before a material change of his/her position, that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

COMMENT

Drawn from R.C. 1333.61.

11. PERSON. R.C. 1.59, R.C. 1333.61.

COMMENT

Although not specifically identified under R.C. 1.59 or R.C. 1333.61, a limited liability corporation also constitutes a "person" under *Ohio's Uniform Trade Secrets Act. Dexxon Digital Storage, Inc. v. Haenszel*, 161 Ohio App.3d 747, 2005-Ohio-3187 (5th Dist.).

12. IMPROPER MEANS. "Improper means" includes theft, bribery, misrepresentation, a breach of a duty to maintain secrecy, inducement of a breach of a duty to maintain secrecy, or (espionage) (spying) through electronic or other means. This can include otherwise lawful conduct that is improper under the circumstances. "Improper means" does not include discovered information by independent invention or reverse engineering. Reverse engineering is starting with a known product and working backward to find the method by which it was developed.

COMMENT

Drawn from R.C. 1333.61.

Drawn from *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 1999-Ohio-260.

13. CONCLUSION. OJI-CV Chapter 313.

14. PROXIMATE CAUSE. OJI-CV Chapter 405.

15. COMPENSATORY DAMAGES. If you find that the defendant has misappropriated the plaintiff's trade secret(s), the plaintiff is entitled to recover compensatory damages consisting of

(A) the actual loss to the plaintiff caused by the misappropriation; and

(B) the unjust enrichment to the defendant caused by the misappropriation that is not taken into account in computing actual loss.

COMMENT

Drawn from R.C. 1333.63(A).

16. ACTUAL LOSS. "Actual loss" means the plaintiff's lost profits.

COMMENT

Avery Dennison Corp. v. Four Pillars Ent. Co., 45 Fed. Appx. 479 (6th Cir.2002).

Ohio law treats these two theories as distinct and requires (for an award of lost profits) that a plaintiff demonstrate with reasonable certainty that it suffered a loss as a result of the defendant's wrongdoing. *Allied Erecting & Dismantling Co. v. Genesis Equip. & Mfg.*, 511 Fed. Appx. 398 (6th Cir. 2013), citing *Columbus Steel Castings Co. v. King Tool Co.,* 10th Dist. Franklin Nos. 11AP-351 and 11AP-355, 2011-Ohio-6826.

17. UNJUST ENRICHMENT. "Unjust enrichment" means the value to the defendant of the trade secret resulting from the misappropriation. In determining this value, you may consider the value

(*Use appropriate alternative[s]*)

(A) to the defendant of the secret at the time of misappropriation such as what a reasonably prudent investor would have paid for the trade secret;

(*or*)

(B) derived from savings because of increased productivity;

(*or*)

(C) derived from savings in research costs;

(*or*)

(D) (*specify other measure of value*).

COMMENT

Drawn from *Avery Dennison Corp. v. Four Pillars Ent. Co.*, 45 Fed. Appx. 479 (6th Cir.2002), construing R.C. 1333.63(A).

18. REASONABLE ROYALTY (ADDITIONAL). If you decide that the compensatory damages provided by actual loss and unjust enrichment are insufficient under the circumstances, you may then consider an award of damages based on a reasonable royalty as an alternative. You may not issue an award based on actual loss and unjust enrichment plus a reasonable royalty.

A royalty is a license to use the trade secret and measures the value of the trade secret to the defendant at the time that it was misappropriated, regardless of the commercial success of the enterprise. You should calculate what the parties would have agreed to as a fair price for licensing the defendant to put the trade secret to the use the defendant intended at the time the misappropriation took place. The royalty must be fair and

reasonable under the circumstances, and you should consider the loss to the plaintiff, the benefit to the defendant, or both.

COMMENT

Drawn from R.C. 1333.63(A); *Mid-Michigan Computer Sys., Inc. v. Marc Glassman, Inc.*, 416 F.3d 505 (6th Cir. 2005) (the district court properly instructed the jury, to wit: "In determining which method to use to calculate [Plaintiff's] compensatory damages, if you determine that [Plaintiff's] lost profits and [Defendant's] unjust enrichment are inadequate to fully compensate [Plaintiff] for the misappropriation of its trade secrets, then you should calculate compensatory damages based upon a reasonable royalty"); *Avery Dennison Corp. v. Four Pillars Ent. Co.*, 45 Fed. Appx. 479 (6th Cir.2002).

A reasonable royalty under R.C. 1333.63(A) can only be awarded for the defendant's past conduct, not for future conduct that would fall under R.C. 1333.62(B). *Mid-Michigan Computer Sys., Inc. v. Marc Glassman, Inc.*, 416 F.3d 505 (6th Cir. 2005). *See also Proper Measure and Elements of Damages for Misappropriation of Trade Secrets—Royalties*, 28 A.L.R.7th 6.

19. PUNITIVE DAMAGES (ADDITIONAL). If you award compensatory damages, you may also consider an award of punitive damages. The purposes of punitive damages are to punish the defendant for misconduct and to deter others from doing the same. If you do not award compensatory damages, you may not consider punitive damages. In order to award punitive damages, you must find by clear and convincing evidence that the defendant's misappropriation was both willful and malicious.

COMMENT

Drawn from R.C. 1333.63(B); *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113; *Becker Equip., Inc. v. Flynn*, 12th Dist. Butler No. CA2002-12-313, 2004-Ohio-1190.

Although R.C. 1333.63 states that the court may award punitive damages, the Committee believes that the issue of punitive damages may be a jury issue. *Newark Group, Inc. v. Sauter*, S.D. Ohio No. C2: 01-CV-1247 (Mar. 26, 2004); *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461.

20. AMOUNT OF PUNITIVE DAMAGES (ADDITIONAL). If you award punitive damages, the amount should be fair and reasonable under all of the facts and circumstances. It should neither be excessive nor influenced by passion, sympathy, or prejudice.

COMMENT

Drawn from R.C. 1333.63(B). *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113.

The Committee believes that the punitive damages cap contained in R.C. 1333.63(B) preempts the maximum amounts set forth in R.C. 2315.21. *Phoenix Lighting Grp. LLC v. Genlyte Thomas Grp. LLC*, 9th Dist. Summit No. 28082,

2018-Ohio-2393, reversed on other grounds, 2020-Ohio-1056. If the jury's award of punitive damages exceeds three times the compensatory damages, then the court must adjust the award to three times the award of compensatory damages.

21. CLEAR AND CONVINCING EVIDENCE. OJI-CV 303.07.

22. WILLFUL AND MALICIOUS/MALICE. OJI-CV 315.37.

COMMENT

Because the combined definitions of "willful" and "malicious" in this context are similar to the definition of "actual malice", the instruction for actual malice is appropriate. *Becker Equipment, Inc. v. Flynn*, 12th Dist. Butler No. CA2002-12-313, 2004-Ohio-1190.

23. ATTORNEY FEES. OJI-CV 315.37 § 12.

CV 537.13 Labor-management disputes *[Rev. 12/7/19]*

1. GENERAL. The plaintiff claims that the defendant (breached) (broke) the collective bargaining agreement between them.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the defendant violated section (*insert labor agreement section number*) of the agreement by (*describe the defendant's conduct*).

COMMENT

Refer to OJI-CV Chapter 501, CONTRACTS, for instructions pertinent to any contract issues.

If this is a tort claim, the burden of proof may be "clear proof." *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). *See also* OJI-CV 303.07.

3. CONTRACTS—EXPRESS OR IMPLIED (ADDITIONAL). OJI-CV 501.03.

(Text continued on page 609)

4. AGENCY—CONTRACTS. OJI-CV 423.01.

COMMENT

Whether the union can be held liable for breach of contract may depend upon the scope of authority of a certain union member or representative to act as an agent of the union.

5. PROXIMATE CAUSE. OJI-CV Chapter 405.

6. DAMAGES. OJI-CV 501.33, OJI-CV 501.35.

7. CONCLUSION. OJI-CV Chapter 313.

CV 537.15 Liability to employees: breach of contract and duty of fair representation *[Rev. 12/7/19]*

1. GENERAL. The plaintiff claims that the defendant(s) (breached) (broke) the collective bargaining agreement between them and that the union failed to represent him/her fairly.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the plaintiff's employer violated section (*insert labor agreement section number*) of the collective bargaining agreement by (*describe the employer's conduct*); and

(B) the defendant union's conduct in representation of the plaintiff was arbitrary, discriminatory, or in bad faith.

COMMENT

Vaca v. Sipes, 386 U.S. 171 (1967); *Garrison v. Cassens Transp. Co.*, 334 F.3d 528 (6th Cir. 2003); *Blesedell v. Chillicothe Tel. Co.*, 811 F.3d 211 (6th Cir. 2016); *Hank v. Great Lakes Constr. Co.*, N.D.Ohio No. 1:16-CV-02104 (Sept. 28, 2018), 2018 U.S. Dist. LEXIS 219341.

3. CONTRACTS—EXPRESS OR IMPLIED (ADDITIONAL). OJI-CV 501.03.

4. DEFINITIONS.

(A) ARBITRARY. Conduct is "arbitrary" when it is not based upon reason or judgment. In order to find that the union acted in an arbitrary manner you must find that the union's (decision) (*describe conduct*) was made without any valid reason and without the exercise of judgment.

COMMENT

Drawn from Black's Law Dictionary (11th Ed.1979) 96.

(B) DISCRIMINATORY. Conduct is "discriminatory" when in bad faith it fails to treat everyone equally. In order to find that the union acted or failed to act in a discriminatory manner, you must find that the union's action or inaction was motivated by bad faith or hostility.

COMMENT

Drawn from *Hines v. Internatl Bd. of Teamsters Local 377*, 506 F.2d 1153 (6th Cir. 1974). *See also Hank v. Great Lakes Constr. Co.*, N.D.Ohio No. 1:16-CV-02104 (Sept. 28, 2018), 2018 U.S. Dist. LEXIS 219341; *Dragomier v. Local 1112 Internatl. Union UAW*, 64 F. Supp. 3d 1033 (N.D. Ohio 2014).

(C) BAD FAITH. Conduct is "in bad faith" when it is designed to mislead or deceive, or is not prompted by an honest mistake or belief as to the merits of the matter, but is based upon some ulterior motive or intent to harm.

COMMENT

Drawn from *Merritt v. Internatl. Assn. of Machinists & Aerospace Workers*, 613 F.3d 609 (6th Cir. 2010); Balowski v. UAW, 372 F.2d 829 (6th Cir.1967); *Humphrey v. Moore*, 375 U.S. 335 (1964).

5. PROXIMATE CAUSE. OJI-CV Chapter 405.

6. DAMAGES. OJI-CV 501.33, OJI-CV 501.35.

COMMENT

Damages caused solely by the employer's breach of contract cannot be awarded against the union, but increases, if any, in those damages caused by the union's act or failure to act cannot be awarded against the employer.

"The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each." *Vaca v. Sipes*, 386 U.S. 171 (1967).

"Although the union remains primarily responsible for the portion of damages resulting from its default, Vaca made clear that the union's breach does not absolve the employer of liability. Thus if the petitioner in this case does not collect the damages apportioned against [the union], the [employer] remains secondarily liable for the full loss of back pay." (Emphasis added.) *Bowen v. U.S. Postal Serv.*, 459 U.S. 212 (1983). Note that the "increase" for which the employer is secondarily liable is limited to back pay. The union is responsible for the employee's attorney fees among his/her other, added expenses and costs (caused by the breach of duty of fair representation), but the employer ordinarily has no secondary responsibility for them. *But see Sparks v. Int'l Union, United Auto., Aero. & Agric. Implement Workers*, 1999 U.S.App. Lexis 830 (6th Cir. 1999); *Allen v. Allied Plant Maintenance Co. of Tennessee Inc.*, 881 F.2d 291 (6th Cir. 1989) where the employer and union may be jointly and separately liable for attorney fees.

The Committee believes that the court should consider submitting interrogatories for the jury to answer, depending upon the issues in evidence.

7. DAMAGES: ATTORNEY FEES. If you award damages against the union, you shall consider and add to that award of damages the employee's expenses and costs, including a reasonable amount for the attorney fees of counsel employed by him/her, because of the union's (act or failure to act) (breach of its duty of fair representation).

COMMENT

An employee is entitled to include in damages against the union the amount that he/she reasonably expended in attorney fees and other costs in prosecuting his/her claim against the company, costs which he/she would not have incurred but for the union's breach of its duty to represent him/her fairly and in good faith. *Scott v. Int'l Brotherhood of Teamsters, etc.*, 548 F.2d 1244 (6th Cir. 1977).

8. REASONABLENESS OF ATTORNEY FEES. OJI-CV 315.39.

9. PUNITIVE DAMAGES. OJI-CV 315.37.

COMMENT

Punitive damages cannot be awarded against a union for breach of the duty of fair representation. *Int'l Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42 (1979). Punitive damages may be awarded against the employer in certain circumstances. The Committee believes that state law regarding entitlement to punitive damages is applicable.

The Seventh Circuit has interpreted *Foust* to foreclose the recovery of punitive damages in all fair representation suits but neither the United States Supreme Court nor the Seventh Circuit has considered whether *Foust* should be extended to breach of contract actions by a union against an employer. Courts are split on this issue. Most courts follow the rule that punitive damages are awarded in contract cases against the employer only where the defendant's conduct is outrageous. Other courts have allowed punitive damages only where such an award would advance the remedial purposes of national labor policy to ensure peace between labor and management. Drawn from *Pappas v. Jewel Food Stores Div.*, N.D.Ill. No. 86 C 9274 (July 1, 1987), 1987 U.S. Dist. LEXIS 5935.

10. CONCLUSION. OJI-CV Chapter 313.

CV 537.17 Wrongful discharge; public policy tort *[Rev. 12/7/19]*

COMMENT

The Supreme Court of Ohio has defined the elements of a public policy wrongful discharge tort as:

(1) a clear public policy prohibiting the employer's conduct existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law ("clarity"); and

(2) discharging employees under circumstances like those involved in the plaintiff's discharge would jeopardize the public policy ("jeopardy"); and

(3) the plaintiff's discharge was motivated by conduct related to the public policy at issue ("causation"); and

(4) that the employer lacked overriding business justification for the plaintiff's discharge ("overriding justification").

The existence of the first two elements, "clarity" and "jeopardy," are questions of law for the court; the second two elements, "causation" and "overriding justification," are questions of fact for the jury.

See, generally, Kulch v. Structural Fibers, Inc., 78 Ohio St.3d 134 (1997); *Collins v. Rizkana*, 73 Ohio St.3d 65 (1995); *Painter v. Graley*, 70 Ohio St.3d 377 (1994); *Greeley v. Miami Valley Maintenance Contractors*, 49 Ohio St. 3d 228 (1990).

It is unclear whether the fourth element, "overriding justification," is an element of the plaintiff's claim, is subject to the kind of burden-shifting analysis used in discrimination cases, or is an affirmative defense. Compare *Kulch, supra*, with *Godfredson v. Hess & Clark, Inc.*, 996 F. Supp. 730 (6th Cir. 1999). The following instruction treats the fourth element as an element of the plaintiff's claim.

Because the employment relationship is a contractual relationship, *see, e.g., Phung v. Waste Mgt., Inc.* 23 Ohio St.3d 100 (1986) (overruled on other grounds), instructions on the typical contract issues of offer, acceptance, consideration, interpretation, and modification may be adapted for use in the employment context. *See* OJI-CV Chapter 501.

For claims involving discrimination, see OJI-CV Chapter 533. *See also* R.C. 4112.02; R.C. 4112.14. "A clear reading of [former section R.C. 4101.17] indicates that it was enacted by the General Assembly in order to permit a civil cause of action for aggrieved employees to redress claims of age discrimination." *Kohmescher v. Kroger Co.,* 61 Ohio St.3d 501 (1991).

1. GENERAL. The plaintiff claims that he/she was discharged in violation of (*describe public policy*). It is the public policy of the state of Ohio that (*describe public policy*).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that (*describe protected activity*) was a deciding factor in his/her discharge and that (*insert name of employer*) lacked an overriding business justification for discharge of the plaintiff.

COMMENT

The plaintiff has the burden of articulating a clear public policy by identifying specific provisions in the federal or state constitution, statutes, administrative rules

and regulations, or common law. *Dohmi v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609. Ohio recognizes a common law tort claim for wrongful discharge in violation of public policy when an injured employee suffers a retaliatory employment action after injury but before filing, instituting, or pursuing a workers' compensation claim. *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723.

3. DECIDING FACTOR. "Deciding factor" means that the (*describe protected activity*) made a difference in (*insert name of employer*)'s decision to discharge (*insert name of employee*). There may be more than one reason for (*insert name of employer*)'s decision to discharge (*insert name of employee*). (*Insert name of employee*) need not prove that (*describe protected activity*) was the only reason. It is not a deciding factor if (*insert name of employee*) would have been discharged regardless of (*describe protected activity*).

4. CONSTRUCTIVE DISCHARGE: OPTIONAL. OJI-CV 533.23.

5. DAMAGES. OJI-CV 533.25.

6. CONCLUSION. OJI-CV Chapter 313.

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Chapter CV 541

SECURITIES

CV 541.01 Civil liability of seller for fraud *[Rev. 1-23-10]*

CV 541.03 Civil liability of adviser *[Rev. 1-23-10]*

CV 541.05 Civil liability of investment adviser or investment adviser representative *[Rev. 1-23-10]*

CV 541.07 Prohibited conduct *[Rev. 1-23-10]*

CV 541.09 Common law claims for relief *[Rev. 8-11-10]*

CV 541.01 Civil liability of seller for fraud R.C. 1707.41 *[Rev. 1-23-10]*

1. GENERAL. The plaintiff claims that the defendant(s) (made [a] false material statement[s]) (omitted [a] material fact[s]) in connection with the sale of (a security) (securities).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the plaintiff purchased a security in reliance on a written or printed circular, prospectus, or advertisement;

(B) the defendant(s) offered the security for sale to the plaintiff or received profits from the sale of that security;

(C) the circular, prospectus, or advertisement (contained a false material statement) (omitted a material fact); and

(D) the plaintiff was injured as a (proximate) (direct) result of the defendant's (false material statement) (omission of a material fact).

3. FALSITY (FALSE). A representation is false when it is not substantially true. The truth or falsity of a representation depends on the natural and obvious meanings of the words taking into consideration all of the surrounding circumstances.

COMMENT

R.C. Chapter 1707 does not provide a definition of falsity. The definition given is taken from OJI-CV 449.03, which the Committee believes is applicable by analogy.

4. MATERIAL STATEMENT OR OMISSION. A statement or omission of fact is

material if there is a substantial likelihood that a reasonable investor would attach importance to it in deciding whether to purchase the security.

COMMENT

Drawn from *Basic, Inc. v. Levinson* (1988), 485 U.S. 224. See also, ABA Model Jury Instr. Sec. Lit 2.03; Ninth Circuit Model Jury Instructions 18.2.

Ohio courts have not adopted a uniform definition of materiality in cases alleging securities fraud.

5. SELL. "Sell" means any act by which a sale is made.

COMMENT

R.C. 1707.01.

6. SECURITY. R.C. 1707.01.

7. PURCHASE. R.C. 1707.01.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. LIABILITY OF DIRECTORS (ADDITIONAL). If you find that (*insert name of corporate defendant*) is liable to the plaintiff for damages, then you must also find each director of (*insert name of corporate defendant*) liable for the plaintiff's damages. (You shall then consider any affirmative defenses.)

COMMENT

Drawn from R.C. 1707.41(B)(1).

This instruction will be given only in cases in which the defendant is a corporation.

10. DIRECTOR. R.C. 1707.01.

11. AFFIRMATIVE DEFENSES:

COMMENT

Section (B) below applies when the defendant is the offeror, or seller, of the security or the person receiving profit from the sale of the security. Section (C) below applies only when the liability of a corporate director is involved and the

"Liability of Directors" instruction has been given.

(A) GENERAL. OJI-CV 303.03 § 4.

(B) OFFEROR OF SECURITY OR PERSON RECEIVING PROFIT. (*Insert name of defendant*) claims that he/she/it is not liable for the (false material statement[s]) (omission of material fact[s]) made in connection with the sale of the (security) (securities). Before you can find for the defendant, you must find by the greater weight of the evidence that

(*Use appropriate alternative*)

(1) he/she/it had no knowledge of the publication of the written or printed circular, prospectus, or advertisement prior to the plaintiff's purchase of the (security) (securities).

(*or*)

(2) he/she/it had just and reasonable grounds to believe that the (false material statement(s) [was] [were] true) (omitted fact[s] [was] [were] not material).

COMMENT

Drawn from R.C. 1707.41(A).

(C) CORPORATE DIRECTOR. (*Insert name of corporate director*) claims that he/she is not liable for the (false material statement[s]) (omission of material fact[s]) made in connection with the sale of the (security) (securities). Before you can find for (*Insert name of corporate director*), you must find by the greater weight of the evidence that

(1) he/she had no knowledge of the publication of the circular, prospectus, or advertisement prior to the plaintiff's purchase of the security.

(*or*)

(2) he/she had just and reasonable grounds to believe that the false material statement(s) (was) (were) true or that the omitted fact(s) (was) (were) not material.

COMMENT

Drawn from R.C. 1707.41(B)(1).

This instruction should be given for each defendant director asserting an affirmative defense.

(D) EXEMPTION FOR PROFESSIONAL IMMUNITY. OJI-CV 541.09 § 2; R.C. 1707.431.

(E) EXEMPTION FOR NO RECEIPT OF COMPENSATION. OJI-CV 541.09 § 3; R.C. 1707.431.

(F) EXEMPTION BY DIVISION OF SECURITIES RULE. OJI-CV 541.09 § 4; R.C. 1707.431.

12. KNOWLEDGE. Lack of reasonable diligence under the facts and circumstances in ascertaining the (fact of) (falsity of any statement contained in) (omission of any material fact from) the publication is deemed to be knowledge of the publication and of the (falsity of any untrue statement in it) (omission of material facts).

COMMENT

Drawn from R.C. 1707.41(C).

13. CONCLUSION FOR PLAINTIFF. If you find by the greater weight of the evidence that the plaintiff proved his/her/its claim, then you must further decide whether the defendant's conduct caused the plaintiff to suffer any damages and, if so, in what amount.

14. CONCLUSION FOR DEFENDANT. If you find by the greater weight of the evidence that the plaintiff failed to prove any part of his/her/its claim (or that the defendant proved by the greater weight of the evidence that [*insert applicable affirmative defense*]), then you will find for the defendant.

15. DAMAGES.

COMMENT

R.C. 1707.41(A) provides for the specific recovery of damages flowing from the false representation, while R.C. 1707.43 provides for a general right to rescissionary damages for every sale or contract for sale made in violation of R.C. Chapter 1707. See *Perrysburg Twp. v. Rossford Arena Amphitheater Auth.*, 175 Ohio App.3d 549, 2008-Ohio-363 ¶ 71 ("the broad language used in R.C. 1707.43 is intended to provide remedies for all violations of R.C. Chapter 1707"). Because a plaintiff must elect which damages to pursue, only one of the following instructions should be given in any case. See id.; see, also, *Federated Mgt. Co. v. Coopers & Lybrand*, 10th Dist. No. 03AP-204, 2004-Ohio-4785; *Byrley v. Nationwide Life Ins. Co.* (1994), 94 Ohio App.3d 1.

Punitive damages are not available to a plaintiff for a violation of R.C. 1707.41. *Byrley*, 94 Ohio App.3d 1.

(A) GENERAL. If you find the defendant liable, then you may award to the plaintiff damages only for the loss or damage sustained by the plaintiff that is due to his/her reliance on the (false material statement) (omission of material fact).

COMMENT

Drawn from R.C. 1707.41(A).

Ohio courts have interpreted the statute to include "the time value of money foregone due to the failed investment." *Federated Mgt. Co. v. Coopers & Lybrand*, 10th Dist. No. 03AP-204, 2004-Ohio-4785.

(B) RESCISSIONARY DAMAGES.

(1) PLAINTIFF STILL OWNS SECURITIES. If you find the defendant liable, then you may award to the plaintiff the purchase price of the securities. The plaintiff may recover the full purchase price of the securities, without an offset for income, dividends, or tax benefits received by the plaintiff. If you do award the plaintiff the full purchase price of the securities, the securities will be returned to the defendant.

(2) PLAINTIFF NO LONGER OWNS SECURITIES. If you find the defendant liable and the plaintiff no longer owns the securities, you may award the plaintiff the difference between the initial cost of the securities and the amount for which the securities were sold without an offset for income, dividends, or tax benefits received by the plaintiff.

COMMENT

Drawn from R.C. 1707.43(A); *Mandalaywala v. Yajnik* (Feb. 13, 2001), 10th Dist. No. 00AP-741; *McNamara v. Hurtz Major Financial Servs. Corp.* (S.D.Ohio July 20, 2006), No. 2:01CV1953; *Roger v. Lehman Bros. Kuhn Loeb, Inc.* (S.D.Ohio 1985), 621 F. Supp 114.

A plaintiff who seeks to recover his/her purchase price cannot obtain pre-judgment interest. *Mandalaywala v. Yajnik* (Feb. 13, 2001), 10th Dist. No. 00AP-741.

CV 541.03 Civil liability of adviser R.C. 1707.42(A) *[Rev. 1-23-10]*

1. GENERAL. The plaintiff claims that the defendant acted as an adviser in violation of the Ohio Securities Act and that the plaintiff sustained a loss as a result of the advice received.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the

greater weight of the evidence that

(A) the defendant acted with the intent to secure financial gain to himself/herself;

(B) the defendant advised and (procured) (induced) the plaintiff to purchase any security;

(C) the defendant received a commission or reward for his/her advice or services;

(D) the defendant did not disclose to the plaintiff the (fact of the defendant's agency) (defendant's interest in such sales); and

(E) the plaintiff was injured as a (proximate) (direct) result of the defendant's conduct.

COMMENT

Drawn from R.C. 1707.42(A).

The Committee believes that the statutory requirement that the plaintiff tender the security to the defendant is a condition precedent to suit and not an element of the claim. See R.C. 1707.42(A).

3. SECURITY. R.C. 1707.01.

4. PURCHASE. R.C. 1707.01.

5. AGENCY. OJI-CV 423.01.

6. PROXIMATE CAUSE. OJI-CV Chapter 405.

7. AFFIRMATIVE DEFENSES:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) EXEMPTION FOR PROFESSIONAL IMMUNITY. OJI-CV 541.09 § 2; R.C. 1707.431.

(C) EXEMPTION FOR NO RECEIPT OF COMPENSATION. OJI-CV 541.09 § 3; R.C. 1707.431.

(D) EXEMPTION BY DIVISION OF SECURITIES RULE. OJI-CV 541.09 § 4; R.C. 1707.431.

8. CONCLUSION FOR PLAINTIFF. If you find by the greater weight of the evidence that the plaintiff proved his/her/its claim, then you must further decide whether the defendant's conduct caused the plaintiff to suffer any damages and, if so, in what amount.

9. CONCLUSION FOR DEFENDANT. If you find by the greater weight of the evidence that the plaintiff failed to prove any part of his/her/its claim (or that the defendant proved by the greater weight of the evidence that *[insert applicable*

affirmative defense]), then you will find for the defendant.

10. DAMAGES.

COMMENT

R.C. 1707.42(A) provides for the specific recovery of damages resulting from the misconduct of the adviser, while R.C. 1707.43 provides for a general right to rescissionary damages for every sale or contract for sale made in violation of R.C. Chapter 1707. See *Perrysburg Twp. v. Rossford Arena Amphitheater Auth.*, 175 Ohio App.3d 549, 2008-Ohio-363 ¶ 71 ("the broad language used in R.C. 1707.43 is intended to provide remedies for all violations of R.C. Chapter 1707"). Because a plaintiff must elect which damages to pursue, only one of the following instructions should be given in any case. See id.; cf. *Federated Mgt. Co. v. Coopers & Lybrand*, 10th Dist. No. 03AP-204, 2004-Ohio-4785; *Byrley v. Nationwide Life Ins. Co.* (1994), 94 Ohio App.3d 1.

(A) GENERAL. If you find the defendant liable, then you may award to the plaintiff damages proximately caused by the violation.

COMMENT

Drawn from R.C. 1707.42(A); *State of Ohio Dept. of Commerce, Div. of Sec. v. Buckeye Fin. Corp.* (1978), 54 Ohio St.2d 407.

(B) RESCISSIONARY DAMAGES.

(1) PLAINTIFF STILL OWNS SECURITIES. If you find the defendant liable, then you may award to the plaintiff the purchase price of the securities. The plaintiff may recover the full purchase price of the securities, without an offset for income, dividends, or tax benefits received by the plaintiff. If you do award the plaintiff the full purchase price of the securities, the securities will be returned to the defendant.

(2) PLAINTIFF NO LONGER OWNS SECURITIES. If you find the defendant liable and the plaintiff no longer owns the securities, you may award the plaintiff the difference between the initial cost of the securities and the amount for which the securities were sold without an offset for income, dividends, or tax benefits received by the plaintiff.

COMMENT

Drawn from R.C. 1707.43(A); *Mandalaywala v. Yajnik* (Feb. 13, 2001), 10th Dist. No. 00AP-741; *McNamara v. Hurtz Major Financial Servs. Corp.* (S.D.Ohio

July 20, 2006), No. 2:01CV1953; *Roger v. Lehman Bros. Kuhn Loeb, Inc.* (S.D.Ohio 1985), 621 F. Supp 114.

A plaintiff who seeks to recover his/her purchase price cannot obtain prejudgment interest. *Mandalaywala v. Yajnik* (Feb. 13, 2001), 10th Dist. No. 00AP-741.

CV 541.05 Civil liability of investment adviser or investment adviser representative R.C. 1707.42(B) *[Rev. 1-23-10]*

1. GENERAL. The plaintiff claims that the defendant acted as an (investment adviser) (investment adviser representative) in violation of the Ohio Securities Act and that the plaintiff sustained a loss as a result of the advice received.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) the defendant acted as an (investment adviser) (investment adviser representative);

(B) the defendant (*describe alleged conduct in violation of R.C. Chapter 1707*); and

(C) the plaintiff was injured as a (proximate) (direct) result of the defendant's conduct.

COMMENT

R.C. 1707.42(B) targets any violation of R.C. Chapter 1707. The trial judge should draw upon the statutory provision allegedly violated when describing the specific conduct on which the R.C. 1707.42(B) claim is based.

3. INVESTMENT ADVISER. R.C. 1707.01.

4. INVESTMENT ADVISER REPRESENTATIVE. R.C. 1707.01.

5. SECURITY. R.C. 1707.01.

6. PROXIMATE CAUSE. OJI-CV Chapter 405.

7. AFFIRMATIVE DEFENSES:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) EXEMPTION FOR PROFESSIONAL IMMUNITY. OJI-CV 541.09 § 2; R.C. 1707.431.

(C) EXEMPTION BY DIVISION OF SECURITIES RULE. OJI-CV 541.09 § 4; R.C. 1707.431.

8. CONCLUSION FOR PLAINTIFF. If you find by the greater weight of the

evidence that the plaintiff proved his/her/its claim, then you must further decide whether the defendant's conduct caused the plaintiff to suffer any damages and, if so, in what amount.

9. CONCLUSION FOR DEFENDANT. If you find by the greater weight of the evidence that the plaintiff failed to prove any part of his/her/its claim (or that the defendant proved by the greater weight of the evidence that *[insert applicable affirmative defense]*), then you will find for the defendant.

10. DAMAGES.

COMMENT

R.C. 1707.42(B) provides for the specific recovery of damages resulting from the misconduct of the investment adviser or investment adviser representative, while R.C. 1707.43 provides for a general right to rescissionary damages for every sale or contract for sale made in violation of R.C. Chapter 1707. See *Perrysburg Twp. v. Rossford Arena Amphitheater Auth.*, 175 Ohio App.3d 549, 2008-Ohio-363 ¶ 71 ("the broad language used in R.C. 1707.43 is intended to provide remedies for all violations of R.C. Chapter 1707"). Because a plaintiff must elect which damages to pursue, only one of the following instructions should be given in any case. See id.; cf. *Federated Mgt. Co. v. Coopers & Lybrand*, 10th Dist. No. 03AP-204, 2004-Ohio-4785; *Byrley v. Nationwide Life Ins. Co.* (1994), 94 Ohio App.3d 1.

(A) GENERAL. If you find the defendant liable, then you may award to the plaintiff damages proximately caused by the violation, including any consideration paid for the advice and any loss due to the advice, less the amount of any income received from the advice.

COMMENT

Drawn from R.C. 1707.42(B); *State of Ohio Dept. of Commerce, Div. of Sec. v. Buckeye Fin. Corp.* (1978), 54 Ohio St.2d 407.

(B) RESCISSIONARY DAMAGES.

(1) PLAINTIFF STILL OWNS SECURITIES. If you find the defendant liable, then you may award to the plaintiff the purchase price of the securities. The plaintiff may recover the full purchase price of the securities, without an offset for income, dividends, or tax benefits received by the plaintiff. If you do award the plaintiff the full purchase price of the securities, the securities will be returned to the defendant.

(2) PLAINTIFF NO LONGER OWNS SECURITIES. If you find the defendant

liable and the plaintiff no longer owns the securities, you may award the plaintiff the difference between the initial cost of the securities and the amount for which the securities were sold without an offset for income, dividends, or tax benefits received by the plaintiff.

COMMENT

Drawn from R.C. 1707.43(A); *Mandalaywala v. Yajnik* (Feb. 13, 2001), 10th Dist. No. 00AP-741; *McNamara v. Hurtz Major Financial Servs. Corp.* (S.D.Ohio July 20, 2006), No. 2:01CV1953; *Roger v. Lehman Bros. Kuhn Loeb, Inc.* (S.D.Ohio 1985), 621 F. Supp 114.

A plaintiff who seeks to recover his/her purchase price cannot obtain prejudgment interest. *Mandalaywala v. Yajnik* (Feb. 13, 2001), 10th Dist. No. 00AP-741.

CV 541.07 Prohibited conduct R.C. 1707.44 *[Rev. 1-23-10]*

1. GENERAL. The plaintiff claims that the defendant (*describe nature of alleged conduct*) and that the plaintiff sustained a loss as a result of the defendant's conduct.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the defendant

(*Use appropriate alternative*)

(A) (*describe act or practice that violates R.C. 1707.14[A], [B], or [C], 1707.141[A], 1707.16, 1707.161[A], 1707.162, or 1707.164*), and the plaintiff was injured as a (proximate) (direct) result of the defendant's conduct.

(*or*)

(B) knowingly (made) (caused to be made) a false representation concerning a material and relevant fact in (an oral statement) (a [prospectus] [circular] [description] [application] [written statement]) for the purpose of

(*Use appropriate alternative*)

(1) (registering [securities] [transactions]) (exempting [securities] [transactions] from registration) under Ohio securities law.

(*or*)

(2) securing the qualification of any securities under Ohio securities law.

(*or*)

(3) procuring the licensing of a/an (dealer) (salesperson) (investment adviser) (investment adviser representative) (bureau of workers' compensation chief investment officer) (state retirement system investment officer) under Ohio securities law.

(*or*)

(4) selling any securities in Ohio.

(*or*)

(5) advising for compensation as to the (value of securities) (advisability of investing in, purchasing, or selling securities).

(*or*)

(6) submitting a notice filing to the division of securities under (*specify statutory provision*).

(C) knowingly (sold) (caused to be sold) (offered for sale) (caused to be offered for sale) a security

(*Use appropriate alternative*)

(1)(a) that is not exempt under (*describe applicable statutory exemption under R.C. 1707.02, 1707.03, 1707.04, or 1707.34*).

(*or*)

(1)(b) that has not been registered by coordination or qualification.

(*or*)

(1)(c) that is not the subject matter of a transaction that has been registered by description.

(*or*)

(2) for which the prescribed fees for registering by description, by coordination, or by qualification had not been paid.

(*or*)

(3) when the defendant (had been notified) (had knowledge of a notice) by the division of securities that the (right to buy, sell, or deal in that security) (registration by description, by coordination, or by qualification under which that security may be sold) had been suspended or revoked.

(*or*)

(4) when the offer or sale was accompanied by a statement that the security (has been) (was to be) in any manner indorsed by the division of securities.

COMMENT

Although R.C. 1707.44(C)(1) uses the word "and," Ohio courts have construed the statute in the disjunctive. See *State v. Hurd*, 10th Dist. Nos. 96APA03-323 and 96APA03-328. See, also, *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093 (citing holding of *Hurd*). Options (C)(1)(a), (b), and (c) reflect this approach.

(D) was (an officer, director, or trustee of) (a dealer for) any issuer, that the defendant knew that (such issuer was insolvent) (the liabilities of the issuer exceeded its assets), and that the defendant sold any securities of or for that issuer without disclosing that fact to the purchaser.

(*or*)

(E) acted with the intent to aid in the sale of a security on behalf of an issuer and knowingly made a representation that was (not authorized by the issuer) (at a material variance with statements and documents filed with the division of securities by the issuer).

(*or*)

(F) acted with intent to deceive and (sold) (caused to be sold) (offered for sale) (caused to be offered for sale) a security of an (insolvent issuer) (issuer whose liabilities exceeded its assets taken at their fair market value) while knowing that the (issuer was insolvent) (liabilities of the issuer exceeded its assets).

(*or*)

(G) (purchased) (sold) securities while knowing(ly) (*describe the act or practice that R.C. Chapter 1707, or administrative rules promulgated thereunder, declare illegal, define as fraudulent, or prohibit*).

(*or*)

(H) was a licensed dealer who (refused to [buy from] [sell to] [trade with] any person) (sold a security [of] [for] any issuer who is known in relation to the issuance or sale of the security to have refused to [buy from] [sell to] [trade with] any person) because he/she/it (appeared on a blacklist issued) (was boycotted) by a foreign (corporate) (governmental) entity.

(*or*)

(I) was a dealer in securities who, knowing that his/her/its liabilities exceeded the reasonable value of his/her/its assets, accepted (money) (securities) from a customer who was ignorant of the dealer's insolvency and thereby caused that customer to lose (any part) (the value) of the customer's securities by, without the customer's consent, having

(*Use appropriate alternative*)

(1) (pledged) (sold) (*describe other disposal of security*) the security when the dealer had no lien on or special property in the security.

(*or*)

(2) (pledged the security for more than the amount due) ([*describe other disposal*

of security] for the dealer's own benefit) when the dealer had a lien or indebtedness on the security.

(*or*)

(J) acted with the purpose to deceive and (made) (issued) (published) (caused to be [made] [issued] [published]) a (statement) (advertisement) as to (the value) (alleged facts affecting the value) (the financial condition of any issuer) of securities when the defendant knew that the (statement) (advertisement) was false in a material respect.

(*or*)

(K) acted with the purpose to deceive and (made) (recorded) (published) (caused to be [made] [recorded] [published]) a report of any transaction in securities that was false in any material respect.

(*or*)

(L) was a dealer who engaged in an act that violated (*specify federal statute or Securities and Exchange Commission rule or regulation*).

(*or*)

(M)(1) was an investment (adviser) (adviser representative) who

(*Use appropriate alternative*)

(a) employed a device, scheme, or artifice to defraud any person.

(*or*)

(b) engaged in an act, practice, or course of business that operates or would operate as a fraud or deceit on any person.

(*or*)

(c) while acting as a (principal for his/her own account, knowingly [sold a security to] [purchased a security from]) (salesperson for a person other than a client, knowingly effected a [sale] [purchase] of a security for the account of) a client without disclosing to the client in writing before the completion of the (sale) (purchase) the capacity in which the defendant was acting and without obtaining the consent of the client to the (sale) (purchase).

COMMENT

R.C. 1707.44(M)(1)(c) does not apply to any investment adviser who is registered with the Securities and Exchange Commission under section 203 of the Investment Advisers Act of 1940, 15 U.S.C. 80b-3, or to any transaction with a customer of a licensed dealer or salesperson if the licensed dealer or salesperson is not acting as an investment adviser or investment adviser representative in

relation to the transaction.

(*or*)

(d) engaged in an act, practice, or course of business that is fraudulent, deceptive, or manipulative.

(*or*)

(M)(2) was an investment (adviser) (adviser representative) who was (licensed) (required to be licensed) under Ohio securities law and who (took) (had) custody of the (securities) (funds) of any person, without acting in accordance with (*describe applicable Division of Securities rule[s]*),

(*or*)

(M)(3) (made an untrue statement of a material fact) (omitted to state a material fact that was necessary in order to make the statements not misleading in light of the circumstances under which the statements were made), while the defendant was soliciting (clients) (prospective clients).

(*or*)

(N) knowingly (influenced) (coerced) (manipulated) (misled) any person engaged in the (preparation) (compilation) (review) (audit) of financial statements to be used in the (purchase) (sale) of securities, and the defendant acted for the purpose of rendering the financial statements materially misleading.

(*or*)

(O) was a state retirement system investment officer who

(*Use appropriate alternative[s]*)

(1) employed a device, scheme, or artifice to defraud a state retirement system;

(*or*)

(2) engaged in an act, practice, or course of business that operates or would operate as a fraud or deceit on a state retirement system;

(*or*)

(3) engaged in an act, practice, or course of business that was fraudulent, deceptive, or manipulative;

(*or*)

(4) knowingly failed to comply with (*specify policy adopted pursuant to R.C. 145.094, 742.104, 3307.043, 3309.043, or 5505.065*).

(*or*)

(P) was a bureau of workers' compensation chief investment officer who

(*Use appropriate alternative[s]*)

(1) employed a device, scheme, or artifice to defraud the workers' compensation system;

(*or*)

(2) engaged in an act, practice, or course of business that operates or would operate as a fraud or deceit on the workers' compensation system;

(*or*)

(3) engaged in an act, practice, or course of business that was fraudulent, deceptive, or manipulative;

(*or*)

(4) knowingly failed to comply with (*specify policy adopted pursuant to R.C. 4123.441*).

3. KNOWLEDGE. "Knowledge" includes not only what was known by the defendant but also what should have been known had he/she/it used reasonable diligence to ascertain the facts.

COMMENT

Drawn from R.C. 1707.29, *State v. Warner* (1990), 55 Ohio St.3d 31.

4. FALSITY (FALSE). A representation is false when it is not substantially true. The truth or falsity of a representation depends on the natural and obvious meanings of the words taking into consideration all of the surrounding circumstances.

COMMENT

R.C. Chapter 1707 does not provide a definition of falsity. The definition given is taken from OJI-CV 449.03, which the Committee believes is applicable by analogy.

5. MATERIAL STATEMENT OR OMISSION. A statement or omission of fact is material if there is a substantial likelihood that a reasonable investor would attach importance to it in determining whether to purchase the security.

COMMENT

Drawn from *Basic, Inc. v. Levinson* (1988), 485 U.S. 224. See, also, ABA Model

Jury Instr. Sec. Lit 2.03; Ninth Circuit Model Jury Instructions 18.2.

Ohio courts have not adopted a uniform definition of materiality in cases alleging securities fraud.

6. REGISTERING SECURITIES. "Registering securities" means the act of (filing) (recording) appropriate documents with (*insert name of appropriate governmental entit[y][ies]*) for the purpose of offering or selling securities in Ohio.

7. SECURITIES. R.C. 1707.01.

8. DEALER. R.C. 1707.01.

9. SALESPERSON. "Salesperson" means every natural person, other than a dealer, who is employed, authorized, or appointed by a dealer to sell securities within this state.

COMMENT

R.C. 1707.01.

10. INVESTMENT ADVISER. R.C. 1707.01.

11. INVESTMENT ADVISER REPRESENTATIVE. R.C. 1707.01.

12. BUREAU OF WORKERS' COMPENSATION CHIEF INVESTMENT OFFICER. R.C. 1707.01.

13. STATE RETIREMENT SYSTEM INVESTMENT OFFICER. R.C. 1707.01.

14. STATE RETIREMENT SYSTEM. "State retirement system" means the public employees retirement system, Ohio police and fire pension fund, state teachers retirement system, school employees retirement system, and state highway patrol retirement system.

COMMENT

R.C. 1707.01.

15. SELL. "Sell" means any act by which a sale is made.

COMMENT

R.C. 1707.01.

16. SALE. R.C. 1707.01.

17. PURCHASE. R.C. 1707.01.

18. REGISTRATION BY COORDINATION. R.C. 1707.01.

19. REGISTRATION BY QUALIFICATION. R.C. 1707.01.

20. REGISTRATION BY DESCRIPTION. R.C. 1707.01.

21. DIRECTOR. R.C. 1707.01.

22. ISSUER. "Issuer" means every person who has issued, proposes to issue, or issues any security.

COMMENT

R.C. 1707.01.

23. FAIR MARKET VALUE. The fair market value is the price the assets would bring if offered for sale in the open market by an owner who desired to sell them, but was under no necessity or compulsion to do so, and when purchased by a buyer who desired to buy them, but was under no necessity or compulsion to do so—each having knowledge of the pertinent facts concerning such assets.

24. FRAUD. R.C. 1707.01.

25. AFFIRMATIVE DEFENSE:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) DEALER.

COMMENT

Drawn from R.C. 1707.44(I). This affirmative defense applies only to the scenarios set forth in R.C. 1707.44(I)(1) and (2), and the trial judge should use the appropriate provision in describing the factual scenario.

The defendant claims that he/she/it is not liable for (pledging) (selling) (disposing of) the securities when (*describe alleged factual scenario set forth in R.C. 1707.44[I][1] or [2]*). Before you can find for the defendant, you must find by the greater weight of the evidence that at the time the securities were (pledged) (sold) (disposed of), the dealer had in his/her/its (possession) (control) and available for delivery securities of the same kinds and in amounts sufficient to satisfy all customers entitled to the securities, upon demand and tender of any amount due on

the securities.

26. CONCLUSION FOR PLAINTIFF. If you find by the greater weight of the evidence that the plaintiff proved his/her/its claim, then you will find for the plaintiff.

27. CONCLUSION FOR DEFENDANT. If you find by the greater weight of the evidence that the plaintiff failed to prove any part of his/her/its claim (or that the defendant proved by the greater weight of the evidence that *[describe affirmative defense])*, then you will find for the defendant.

28. PROXIMATE CAUSE. OJI-CV Chapter 405.

29. RECISSIONARY DAMAGES.

COMMENT

R.C. 1707.43 provides for a general right to rescissionary damages for every sale or contract for sale made in violation of R.C. Chapter 1707. See *Perrysburg Twp. v. Rossford Arena Amphitheater Auth.*, 175 Ohio App.3d 549, 2008-Ohio-363 ¶ 71 ("the broad language used in R.C. 1707.43 is intended to provide remedies for all violations of R.C. Chapter 1707").

(A) PLAINTIFF STILL OWNS SECURITIES. If you find the defendant liable, then you may award to the plaintiff the purchase price of the securities. The plaintiff may recover the full purchase price of the securities, without an offset for income, dividends, or tax benefits received by the plaintiff. If you do award the plaintiff the full purchase price of the securities, the securities will be returned to the defendant.

(B) PLAINTIFF NO LONGER OWNS SECURITIES. If you find the defendant liable and the plaintiff no longer owns the securities, you may award the plaintiff the difference between the initial cost of the securities and the amount for which the securities were sold without an offset for income, dividends, or tax benefits received by the plaintiff.

COMMENT

Drawn from R.C. 1707.43(A); *Mandalaywala v. Yajnik* (Feb. 13, 2001), 10th Dist. No. 00AP-741; *McNamara v. Hurtz Major Financial Servs. Corp.* (S.D.Ohio July 20, 2006), No. 2:01CV1953; *Roger v. Lehman Bros. Kuhn Loeb, Inc.* (S.D.Ohio 1985), 621 F. Supp 114.

A plaintiff who seeks to recover his/her purchase price cannot obtain pre-judgment interest. *Mandalaywala v. Yajnik* (Feb. 13, 2001), 10th Dist. No. 00AP-741.

CV 541.09 Common law claims for relief *[Rev. 8-11-10]*

COMMENT

Ohio common law recognizes several basic claims for relief for the purchasers or sellers of securities: fraud, negligence, breach of fiduciary duty, and, in some circumstances, breach of contract. The trial judge should use the existing OJI instructions for each such claim for relief. See OJI Chapters CV 401, 421, 449, and 501. The Committee recognizes that the trial judge will likely need to modify or supplement these existing instructions to present to the jury the specific securities claim involved. Given the relative absence of Ohio case law on common law securities claims, the Committee recommends that the trial judge craft instructions by reference to the *ABA Model Jury Instructions in Broker-Customer Litigation* (October 1, 1986), as proposed by the Broker-Dealer Subcommittee of the Securities Litigation Committee, and *Modern Federal Jury Instructions, Securities Claims*.

TITLE 6

CIVIL MATTER INSTRUCTIONS: PROPERTY-RELATED ISSUES

Chapter CV 601 REAL ESTATE

Chapter CV 605 BROKERS

Chapter CV 609 EMINENT DOMAIN

Chapter CV 613 LANDLORDS, TENANTS

Chapter CV 617 PREMISES LIABILITY

Chapter CV 621 NUISANCE

Chapter CV 625 CONVERSION

Chapter CV 629 BAILMENTS

Chapter CV 633 WILLS

Chapter CV 637 GIFTS

Chapter CV 601

REAL ESTATE

CV 601.01	Ejectment
CV 601.03	Adverse Possession *[Rev. 9-13-03]*
CV 601.05	Trespass
CV 601.07	Adjoining Owners
CV 601.09	Easements

COMMENT

For instructions on the doctrine of *caveat emptor* in real estate sales, see OJI-CV 449.13.

CV 601.01 Ejectment

COMMENT

Originally ejectment was the common-law action for the recovery of possession of real estate. Under present Ohio law, it is a statutory action. R.C. 5303.03–.04. Statutory ejectment is substantially the same as the common-law version. The summary action of forcible entry and detainer has largely superseded ejectment in most situations. OJI-CV Chapter 613.

Trespass and ejectment are similar. Both are based on the defendant's wrongful possession. The main difference is that in ejectment, the plaintiff seeks recovery of possession; in trespass the plaintiff does not. Hence, plaintiff in an ejectment action must prove possession by the defendant; in trespass the plaintiff need not do so.

1. GENERAL. The plaintiff seeks to recover possession of the (land) (premises) (*describe*) from the defendant. To do so, the plaintiff must prove by the greater weight of the evidence that the plaintiff has a right to possession of the (land) (premises), and that defendant keeps the plaintiff out of possession.

COMMENT

The statute requires plaintiff to allege a "legal estate" as the basis of the claim to possession. R.C. 5303.03. Since ejectment is a cause of action at law, it cannot be the basis for the plaintiff's equitable claim to recover possession.

Equitable defenses may be considered, however. OJI-CV 601.01 § 5.

2. RIGHT TO POSSESSION. To establish his right to possession, the plaintiff must prove by the greater weight of the evidence that

(*Use appropriate alternative*)

(A) The plaintiff holds (record title) (title by adverse possession) and has not leased or otherwise given the defendant permission to come on the (land) (premises);

COMMENT

If either party claims record title, its validity is usually a question of law for the court. *Newnam's Lessee v. Cincinnati* (1850), 18 Ohio 323, 333. If either party claims title by adverse possession, the court must instruct the jury on the elements of adverse possession. OJI-CV 601.03.

(*or*)

(B) The plaintiff is entitled to possession under (a lease) (permission) from the owner of the (land) (premises);

(*or*)

(C) The plaintiff was previously in peaceful possession and was removed by the defendant.

3. DEFENDANT'S POSSESSION. The plaintiff must also prove by the greater weight of the evidence that the defendant in fact possesses the (land) (premises) and keeps the plaintiff out of possession.

4. AFFIRMATIVE DEFENSES. The defendant claims that the defendant's possession of the (land) (premises) was justified. To establish this claim the defendant must prove by the greater weight of the evidence that the defendant

(*Use appropriate alternative*)

(A) Holds (record title) (title by adverse possession);

(*or*)

(B) Entered the (land) (premises) under a valid (easement) (lease) (permission from the owner).

COMMENT

For instructions on easements, see OJI-CV 601.09.

5. EQUITABLE DEFENSES.

COMMENT

If the defendant offers an equitable defense, the court must decide its validity. *Cossett v. Moore* (1942) 71 Ohio App. 447, 456, 26 O.O. 370, 374, 49 N.E.2d 190, 193; (Trial court erred by refusing to consider defendant's equitable claim based on a partly-performed oral contract for purchase of land). The court may try such a defense itself without a jury, or with an advisory jury, or, if the parties consent, with a jury "whose verdict has the same effect as if trial by jury had been a matter of right." Civ.R. 39(C). If the equitable defense is potentially dispositive, the court may wish to try this issue first without a jury. If the defendant prevails on this issue, empaneling a jury would be unnecessary.

6. DAMAGES. OJI-CV 601.05 § 5; OJI-CV 315.37.

7. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff has proved both that the plaintiff has a right to possession and that the defendant has kept the plaintiff from possession, and that the defendant has failed to prove that the defendant's possession was justified, you will find for the plaintiff. On the other hand you will find for the defendant if you find that the plaintiff has failed to prove by a greater weight of the evidence either that the plaintiff has a right to possession or that defendant has unlawfully kept the plaintiff from possession or that defendant has proved by the greater weight of the evidence that the defendant's possession was justified.

CV 601.03 Adverse Possession ***[Rev. 9-13-03]***

COMMENT

A plaintiff may use adverse possession to claim title. A defendant may use adverse possession as an affirmative defense in an action to quiet title or to recover possession. This instruction is drafted for a plaintiff claiming title by adverse possession. It must be modified for a defendant making such a claim.

The burden of proof is clear and convincing evidence. *Grace v. Koch*, 81 Ohio St.3d 577, 1998-Ohio-607.

1. INTRODUCTION. The plaintiff claims to be the owner of (*insert description of land*) by adverse possession. The defendant has record title to the land. To establish this claim of (title) (ownership) by adverse possession the plaintiff must prove by clear and convincing evidence that the (plaintiff has) (plaintiff and the plaintiff's predecessors have) been in actual, open, notorious, continuous, hostile, and exclusive possession of the land for at least 21 years.

COMMENT

The statute of limitations for the recovery of real property is 21 years. If the defendant is under a disability when the period of adverse possession begins, the statute does not run out until 10 years after the disability is removed or 21 years after the period of adverse possession began whichever is later. R.C. 2305.04.

2. CLEAR AND CONVINCING. OJI-CV 303.07.

3. PREDECESSOR. A "predecessor" is a person whose possession is connected with that of the plaintiff. That connection may result from inheritance, will, deed, or a (written) (oral) agreement.

COMMENT

The above instruction should be used only when the adverse possessor seeks to tack his adverse possession to that of another. *Zipf v. Dalgarn* (1926), 114 Ohio St. 291, 151 N.E. 174; *McNeely v. Langan* (1872), 22 Ohio St. 32.

4. OPEN AND NOTORIOUS. "Open and notorious" means apparent to an owner visiting the land, considering the character of the land and the type of possession that an owner of such land would usually maintain. Actual notice is not required.

5. CONTINUOUS. "Continuous" means without substantial interruption, considering the character of the land and the type of possession that an owner would usually maintain.

COMMENT

The character of the land affects the requirements that the possession be open, notorious, and continuous. For example, *Ewing's Lessee v. Burnet* (1837), 36 U.S. 41, 9 L.Ed. 624, an Ohio case, involved a gravel pit. The adverse possessor's only acts of possession were occasional extractions of gravel. The court held that the requirements were met because that was the way in which an owner would possess such property. See also *Vanasdal v. Brinker* (1985), 27 Ohio App.3d 298, 500 N.E.2d 876.

6. HOSTILE. "Hostile" means without permission of the defendant and opposed to all other claims to the land. It does not mean full of hate or full of fight. The motive or good faith of the plaintiff makes no difference.

COMMENT

Yetzer v. Thoman (1866), 17 Ohio St. 130.

7. EXCLUSIVE. "Exclusive" means not shared.

8. POSSESSION (OPTIONAL).

COMMENT

Normally the adverse possessor can only acquire title to that land which is actually possessed. However, entry under an invalid instrument, is deemed constructive possession of all of the land described in the instrument. *Humphries v. Huffman* (1879), 33 Ohio St. 395.

If you find that the plaintiff took possession under a (deed) (will), the plaintiff's possession extends to all the land described in the (deed) (will) even though the (deed) (will) was invalid and the plaintiff actually possessed only part of the land.

9. CONCLUSION. You will return a verdict for the plaintiff if you find by clear and convincing evidence that the (plaintiff has) (plaintiff and the plaintiff's predecessors have) been in actual, open, notorious, continuous, hostile, and exclusive possession of the land for at least 21 years. If you find that the plaintiff has failed to prove any of these facts by clear and convincing evidence, then you will return a verdict for the defendant.

CV 601.05 Trespass

COMMENT

Trespass and ejectment are similar. Both are based on the defendant's wrongful possession. The main difference is that in ejectment, the plaintiff seeks recovery of possession; in trespass the plaintiff does not. Hence, plaintiff in an ejectment action must prove possession by the defendant: in trespass the plaintiff need not do so.

For instructions on claims of trespass by animals, see OJI-CV 409.05, OJI-CV 409.07. For instructions on criminal trespass, see OJI-CR 511.13(B) and OJI-CR 511.21.

1. GENERAL. The plaintiff claims that the defendant has trespassed on certain (land) (premises) (*describe*), causing damage to the plaintiff. To establish this claim, the plaintiff must prove by the greater weight of the evidence that the plaintiff (was in possession) (has a right to possession of) the (land) (premises) and that the defendant entered upon the (land) (premises) without permission from the plaintiff.

2. RIGHT TO POSSESSION. To establish a right to possession plaintiff must prove by the greater weight of the evidence that

(*Use appropriate alternative*)

(A) The plaintiff holds (record title) (title by adverse possession);

COMMENT

If plaintiff claims a record title, its validity would usually be a question of law for the court. Plaintiff may claim title by adverse possession or defendant may make such a claim as an affirmative defense. OJI-CV 601.05 § 3. In either case, the jury should be instructed on the elements of adverse possession. OJI-CV 601.03.

(*or*)

(B) The plaintiff is entitled to possession under (a lease) (permission) from the owner of the (land) (premises).

3. AFFIRMATIVE DEFENSES. The defendant claims that the defendant's entry onto the (land) (premises) was justified. To establish this claim, the defendant must prove by the greater weight of the evidence that the defendant

(*Use appropriate alternative*)

(A) Holds (record title) (title by adverse possession);

(*or*)

(B) Entered the (land) (premises) under a valid (easement) (lease) (permission from the owner).

COMMENT

For instructions on easements, see OJI-CV 601.09.

4. EQUITABLE DEFENSES. OJI-CV 601.01 § 5.

5. DAMAGES.

COMMENT

Even though the plaintiff fails to prove actual damages, the plaintiff is entitled to nominal damages. Generally the measure of actual damages is the reduction in the value of the land or premises resulting from the trespass. If the trespass is of substantial duration, the plaintiff may also recover the rental value for the period of the trespass. R.C. 901.51 provides for treble damage liability for a

trespasser who injures vines, bushes, trees, or crops. R.C. 901.99 makes such conduct a minor misdemeanor. If the property is not of a commercial nature, the plaintiff may be entitled to the cost of restoration even if that exceeds the reduction in value. *Denoyer v. Lamb* (1984); 22 Ohio App.3d 136, 490 N.E.2d 615.

6. PUNITIVE DAMAGES. OJI-CV 315.37.

7. CONCLUSION. You will find for the plaintiff if you find by the greater weight of the evidence that the defendant entered the (land) (premises) which the plaintiff (possessed) (had a right to possess) without permission from the plaintiff and that the defendant failed to prove that the defendant (held title) (entered under a valid [lease] [easement] [permission from the owner]). On the other hand, you will find for the defendant if you conclude that the plaintiff failed to prove by the greater weight of the evidence that the defendant entered the (land) (premises) which the plaintiff (possessed) (had a right to possess) without permission from the plaintiff or that the defendant proved that the defendant (held title) (entered under a valid [lease] [easement] [permission from the owner]).

CV 601.07 Adjoining Owners

COMMENT

The common law rules apply if the property is located in an unincorporated area. See § 1 below. The statutory rules apply if the property is located within a municipal corporation. R.C. 723.49-.50. See § 2 below.

1. COMMON LAW RULE. The plaintiff claims that he has suffered damages because the defendant removed the lateral support of the plaintiff's adjoining land (*describe*). The plaintiff must prove by the greater weight of the evidence that the plaintiff's land adjoins that of the defendant and that:

(*Use appropriate alternative*)

(A) The defendant removed lateral support from the plaintiff's land causing damage to the land in its natural state.

COMMENT

There is some authority that a plaintiff can recover for damage to his land even though there are structures on it, if the plaintiff can prove the damage would have occurred if the structures had not been there. *Keating v. Cincinnati* (1883), 38 Ohio St. 141. The defendant cannot avoid liability by showing that an independent contractor did the excavating. *Tiffin v. McCormack* (1879), 34

Ohio St. 638.

(*or*)

(B) The defendant (negligently) (maliciously) removed lateral support from the plaintiff's land causing damage to the land and structures on it.

2. STATUTORY RULE. The plaintiff claims that he has suffered damages because the defendant removed the lateral support of the plaintiff's adjoining land (*describe*). The plaintiff must prove by the greater weight of the evidence that the plaintiff's land adjoins that of the defendant and that the defendant dug an excavation on the defendant's land more than nine feet deep proximately causing damage to (the plaintiff's land) (structures on the plaintiff's land). The depth of the excavation is measured from

(*Use appropriate alternative*)

(A) The curb of the street or streets on which the land abuts;

(*or*)

(B) The established grade of the street or streets on which the land abuts;

(*or*)

(C) The surface of the adjoining property.

COMMENT

The statute provides that if there is a curb, that should be used; if no curb, then the established grade; if neither a curb nor established grade, then the surface of the adjoining property. R.C. 723.49. It also provides a complex engineering method for measuring depth from a curb or established grade. This provision should govern admissibility of evidence on depth of excavation.

3. NATURAL STATE. "Natural state" means without buildings or other improvements.

4. MALICE. "Maliciously" means with an attitude or state of mind that makes a person knowingly do an act for an improper or wrongful purpose.

5. NEGLIGENCE. OJI-CV 401.01.

6. PROXIMATE CAUSE. OJI-CV 405.01.

7. DAMAGES. OJI-CV Chapter 315.

8. PUNITIVE DAMAGES. OJI-CV 315.37.

9. CONCLUSION. You will find for the plaintiff if you find by the greater weight of the evidence that:

(*Use appropriate alternative*)

the defendant removed lateral support causing damage to the plaintiff's land in its natural state.

(*or*)

the defendant (negligently) (with malice) removed lateral support causing damage to the plaintiff's adjoining land and structures on it.

(*or*)

the defendant dug an excavation more than nine feet deep causing damage to the plaintiff's adjoining land and structures on it.

On the other hand, you will find for the defendant if you find that the plaintiff failed to prove these issues by the greater weight of the evidence.

CV 601.09 Easements

1. GENERAL. The plaintiff claims a right to enter the land of the defendant under an easement but that the defendant has refused to allow the plaintiff to enter, causing damage to the plaintiff. An easement allows a person to enter the land of another for a particular purpose.

COMMENT

An easement may be created by grant, prescription, implication, or estoppel.

2. MEANS OF CREATION.

(*Use appropriate alternative*)

(A) GRANT. The plaintiff claims that an easement by a (deed) (grant) from (the defendant) (a former owner of the property).

COMMENT

The instrument must meet all the requirements for a valid conveyance. These issues should be questions of law.

(*or*)

(B) PRESCRIPTION. The plaintiff claims an easement by prescription.

COMMENT

Creating an easement by prescription involves the same facts as creating title by adverse possession. OJI-CV 601.03.

(*or*)

(C) IMPLICATION BY NECESSITY. The plaintiff claims an easement by necessity. To establish this claim, the plaintiff must prove by the greater weight of the evidence that, when the land now owned by the plaintiff was separated from that now owned by the defendant, the easement was strictly necessary to the use of the land now owned by the plaintiff. The easement need not be mentioned in the deed separating the land of the plaintiff from that of the defendant.

COMMENT

Meredith v. Frank (1897), 56 Ohio St. 479, 47 N.E. 656 indicates strict necessity should be required whenever the plaintiff or his predecessor was the grantor in the deed separating the two tracts, even though there was a prior use. This rule is based on the principle that a deed should be construed against the grantor.

(*or*)

(D) IMPLICATION BY PRIOR USE. The plaintiff claims an easement by prior use. To establish this claim, the plaintiff must prove by the greater weight of the evidence that, when the land now owned by the plaintiff was separated from that owned by the defendant, there was a use similar to that of the easement now claimed by the plaintiff and that this claimed easement is reasonably necessary to the use of the land now owned by the plaintiff. This use must be continuous, apparent, and permanent, not a mere temporary arrangement. The easement need not be mentioned in the deed separating the land of the plaintiff from that of the defendant. The use, however, must be sufficient so that the parties must have intended to include it in the deed.

COMMENT

Trattar v. Rausch (1950), 154 Ohio St. 286, 43 O.O. 186, 95 N.E.2d 685.

(*or*)

(E) ESTOPPEL. The plaintiff claims an easement by estoppel. To establish this claim, the plaintiff must prove by the greater weight of the evidence that (the defendant) (a former owner of the defendant's land) allowed (the plaintiff) (a former owner of the plaintiff's land) to spend money or effort in reliance on the existence of the easement claimed by plaintiff.

COMMENT

Buckingham v. Smith (1840), 10 Ohio 288; *Maloney v. Patterson* (1989), 63

Ohio App.3d 405, 579 N.E.2d 230.

3. STRICTLY NECESSARY. "Strictly necessary" means that the plaintiff has no other access to the plaintiff's property. If the plaintiff does have other access even though inconvenient and expensive, the easement claimed is not "strictly necessary."

4. REASONABLY NECESSARY. "Reasonably necessary" means that, although the plaintiff has other access to the plaintiff's land, that other access is impractical. If the easement claimed is merely more convenient, it is not "reasonably necessary."

COMMENT

On the different degrees of necessity, see *Tiller v. Hinton* (1985), 19 Ohio St.3d 66, 482 N.E.2d 946, and *Renner v. Johnson* (1965), 2 Ohio St.2d 195, 31 O.O.2d 406, 207 N.E.2d 751.

5. USE OF EASEMENT.

COMMENT

The use of an easement must be within its purpose. The purpose is determined by the way the easement was created: if by deed or grant, the terms of the instrument; if by prescription, the past use; if by implication, the necessity; if by estoppel, the allowed belief. The plaintiff must prove that his past or planned use of the easement is within its purpose. If use of the easement is an issue, appropriate instructions must be drafted depending upon the way in which the easement was created.

6. DAMAGES. OJI-CV 315.35.

7. CONCLUSION. You will find for the plaintiff if you find by the greater weight of the evidence on all these issues. On the other hand, you will find for the defendant if you find that the plaintiff failed to prove these issues by the greater weight of the evidence.

COMMENT

More precise instructions may be drafted to conform to the way by which the plaintiff claims the easement was created.

Chapter CV 605

BROKERS

CV 605.01	Broker's commission
CV 605.03	Acting for both parties
CV 605.05	Failure of transaction
CV 605.07	Broker's abandonment
CV 605.09	Broker's duty to seller

COMMENT

The issues of OJI-CV Chapter 605 are issues of contract, and caution must be used in drafting instructions which reflect the terms of the specific contract. The following instructions presume the more common relationship in which the broker's contract is with the seller.

The Committee expresses no opinion on whether the broker's violation of statutory or administrative regulations governing broker's conduct affects the broker's right to receive a commission. R.C. 4735.16, 4735.18.

CV 605.01 Broker's commission

1. Plaintiff, as the real estate broker, seeks to recover from the defendant, the seller of the real estate, a commission or fee. For the plaintiff to recover, he/she must prove to you by the greater weight of the evidence that:

(A) He/she was a duly licensed real estate broker at the time of this transaction; and

(B) The plaintiff and defendant entered into a (written) (oral) agreement whereby the defendant would pay to the plaintiff (an agreed sum) (a percentage of the sale price); and

(C) The plaintiff produced a buyer for the real estate who was ready, willing, and able to purchase the real estate within the appropriate length of time; and

(D) The defendant failed or refused to pay the (agreed sum) (percentage of the sale price).

2. CONTRACT. OJI-CV Chapter 501 CONTRACTS.

3. AMOUNT OF COMMISSION. If you find that the amount of commission to be paid to the plaintiff by the defendant was not agreed upon as a part of the contract, you must consider evidence of general custom in the locality relating to what (sum) (percentage) is generally paid to brokers for their services.

4. PERFORMANCE OF CONTRACT. If you find the broker and the seller entered

into a contract, the broker must further prove by the greater weight of the evidence that (within the time limit stated in the contract) (within a reasonable length of time if no limitation is fixed by the contract) he produced a buyer who was ready, willing, and able to purchase the real estate at the agreed price and upon the agreed terms and conditions (fixed by the contract between the broker and the seller) (agreed by the broker and seller). A buyer is ready, willing, and able to buy although he does not have the cash at hand if he would be able to obtain the funds necessary to complete the purchase. In deciding the buyer's ability to obtain the necessary funds, you may consider the (buyer's assets) (credit) (financial rating) (loan agreements) or any other evidence that would indicate buyer's ability or inability to obtain the necessary funds.

COMMENT

Walton v. Hudson (1947), 82 Ohio App. 330, 335, 38 O.O. 28, 79 N.E.2d 921.

5. PROCURING CAUSE. If during the period of the contract between the plaintiff and the defendant the efforts of the plaintiff caused the buyer to contract for the real estate purchase, the plaintiff may recover a (commission) (fee) even if the sale occurred after the contract between the plaintiff and the defendant had (expired) (ended). The plaintiff must prove by the greater weight of the evidence that his/her efforts were the procuring cause of the sale. A "procuring cause" starts a series of events that directly results in finding a buyer who is ready, willing, and able to buy the real estate on the seller's terms. The plaintiff does not have to bring the buyer and the defendant into personal contact but the plaintiff must have had direct negotiations with the buyer.

COMMENT

Mars v. Miclau (1958), 168 Ohio St. 144, 5 O.O.2d 437, 151 N.E.2d 735; *Bauman v. Worley* (1957), 166 Ohio St. 471, 2 O.O.2d 473, 143 N.E.2d 820. There are two types of exclusivity provisions in which "procuring cause" need not be shown for a broker to be entitled to a commission. One type gives the broker the exclusive right to offer to sell and the other type gives only an exclusive listing to one broker so that the seller may still sell the real estate himself without paying a commission.

CV 605.03 Acting for both parties

1. A real estate broker who acts for both the buyer and the seller with respect to a real estate purchase contract cannot recover compensation from either party, even if there is an express written provision promising such compensation, unless it is shown by the greater weight of the evidence that (1) both the buyer and the seller had knowledge of circumstances that might influence the broker's actions; and (2) both the buyer and

seller consented to the double employment.

COMMENT

Parchman & Oyler Co. v. Crawford (1980), 68 Ohio App.2d 109, 22 O.O.3d 130, 427 N.E.2d 546.

CV 605.05 Failure of transaction

1. BECAUSE OF SELLER'S BREACH. If you find by the greater weight of the evidence that the broker produced a buyer who entered into a contract with the defendant to purchase the real estate, the broker is entitled to recover his (commission) (fee) even though the defendant later (failed) (refused) to sell.

COMMENT

Corbin v. Smith (1957), 104 Ohio App. 274, 4 O.O.2d 415, 147 N.E.2d 506.

2. BECAUSE OF BUYER'S BREACH. If you find by the greater weight of the evidence that the broker produced a buyer who entered into a written agreement with the seller to purchase the real estate, but the buyer did not complete the purchase, the broker is entitled to his (commission) (fee).

COMMENT

Scudder v. Wallace (1946), 79 Ohio App. 48, 34 O.O. 333, 71 N.E.2d 308.

3. VOLUNTARY TERMINATION BY BUYER AND SELLER. If you find by the greater weight of evidence that the real estate broker entered into an agreement with the seller of the real estate and produced a buyer for the seller's real estate, the broker is entitled to a (commission) (fee) even though the buyer and seller voluntarily (terminated) (ended) their agreement.

COMMENT

Carey v. Conn (1923), 107 Ohio St. 113, 140 N.E. 643; *Ballard v. Thompson* (1965), 5 Ohio App.2d 92, 34 O.O.2d 197, 214 N.E.2d 102.

4. BROKER'S BREACH. If you find by the greater weight of the evidence that the sales transaction failed because the broker violated his duties arising from the agreement with the seller, the broker cannot recover his (commission) (fee). If the transaction fails for a reason not related to the broker's performance of the broker's

agreement with the seller, the broker is still entitled to a (commission) (fee).

COMMENT

OJI-CV 605.09.

CV 605.07 Broker's abandonment

1. Where a broker abandons the negotiations with a prospective buyer without fault of the seller and the seller later sells the real estate to the same buyer without further effort on the part of the broker, the seller is not liable for a (commission) (fee).

COMMENT

Some contracts provide for an exclusive right to sell and the seller, under this (condition) (circumstance), would owe the commission even though the broker had no participation in the sale.

2. ABANDONMENT. Abandonment occurs whenever the actions or inactions of the broker clearly (indicate) (show) that he/she does not intend to perform his/her duties under the contract, even if there is still time remaining under the contract for the broker to perform.

CV 605.09 Broker's duty to seller

1. A broker has the duty to act in the seller's best interest. The broker owes the seller a duty of good faith and loyalty in all his dealings, including a duty to disclose all material facts known by the broker. If you find by the greater weight of the evidence that the broker breached his duty to the seller (to disclose material facts) (to act in good faith), the broker may not recover a (commission) (fee).

COMMENT

Case v. Business Centers, Inc. (1976), 48 Ohio App.2d 267, 2 O.O.3d 229, 357 N.E.2d 47; *Greenberg v. Meyer* (1977), 50 Ohio App.2d 381, 4 O.O.3d 353, 363 N.E.2d 779.

2. The broker has a duty to the seller to deal with the buyer in a manner that will not excuse the buyer from performing the agreement. If you find by a greater weight of the evidence that the broker's conduct did excuse the buyer from performing the purchase agreement, the broker is not entitled to a (commission) (fee).

COMMENT

Caution should be used in drafting this instruction to include the specific acts of the broker which caused the buyer to be excused from performance of the agreement.

3. DUTY OF NOTIFICATION.

COMMENT

Some brokers' contracts provide that the broker may recover a commission after the listing period has expired if the broker had prior dealings with the buyer. In these cases, the broker must prove that the seller had notice of those prior dealings. See *King v. Dean* (1969), 19 Ohio St.2d 17, 48 O.O.2d 10, 249 N.E.2d 45.

4. DAMAGES. OJI-CV Chapter 315, Damages (compensatory, punitive and nominal).

COMMENT

The broker may be responsible for any damages including punitive damages that proximately result from the broker's breach of the duty of good faith. *Miles v. Perpetual S. & L. Co.* (1979), 58 Ohio St.2d 93, 12 O.O.3d 106,388 N.E.2d 1364.

(Rcl.0852CIV–11/2008 Pub.4346)

Chapter CV 609

EMINENT DOMAIN

CV 609.01	Preliminary instructions
CV 609.03	View of property
CV 609.05	Compensation
CV 609.07	Issues concerning potential use
CV 609.09	Damages
CV 609.11	Structures removed prior to trial
CV 609.13	Easements
CV 609.15	Fixtures
CV 609.17	Natural assets
CV 609.19	Special use property
CV 609.21	Conclusion
CV 609.23	Verdict

COMMENT

The jurors should be informed as early as possible of their function and the definition of terms. The following preliminary instructions should be given during voir dire but must be included in the general charge. Civ.R. 51.

All appropriation proceedings are governed by R.C. Chapter 163. *Weir v. Wiseman* (1982), 2 Ohio St.3d 92, 443 N.E.2d 152.

The civil rules apply in appropriation cases "except to the extent that such rules would, by their nature, be clearly inapplicable." Civ. R. 1(C); *Cleveland Elec. Illuminating Co. v. Astorhurst Land Co.* (1985), 18 Ohio St.3d 268, 480 N.E.2d 794, and *Weir v. Wiseman, supra.*

Section 5, Article XIII, Ohio Constitution and Civ.R. 38(B) provide for a jury of twelve for an appropriation of right-of-way by a corporation.

An appropriation proceeding is essentially one in rem. *Sowers v. Schaeffer* (1951), 155 Ohio St. 454, 44 O.O. 419, 99 N.E.2d 313.

The property value is considered as a whole and is determined in one proceeding without regard to fractional interests. Pokorny v. Local No. 310 (1974), 38 Ohio St.2d 177, 67 O.O.2d 195, 311 N.E.2d 866; *Ohio Sand & Gravel Co. v. Masheter* (1964), 176 Ohio St. 327, 27 O.O.2d 272, 199 N.E.2d 573.

The distribution of proceeds among the mortgagees, lessees, remaindermen

and owners of sub-surface rights is not for jury determination but is governed by R.C. 163.18. *Pokorny, supra.*

These instructions do not address "inverse condemnation."

CV 609.01 Preliminary instructions

1. GENERAL. This is an appropriation action brought by (*name appropriating body*) to acquire property for public purposes from (*land owners*). The property to be taken is (*describe the property*). This may be referred to as "the take." (*If there is a severance explain or describe the residue*). Our laws give (*name appropriating body*) the right to appropriate this property subject to the requirement that compensation for such take (and any damages to a residue) shall be assessed by a jury.

2. The jury acts as an assessing body in determining the amount of compensation and the amount of any damages. As to the amounts of compensation of property and any damages, there is no burden of proof as in other civil cases.

COMMENT

The owners may have a burden of proof as to the existence of underlying minerals. *Tennessee Gas Transm. Co. v. Wolfe* (1953), 159 Ohio St. 391, 50 O.O. 350, 112 N.E.2d 376; the existence of a residue, *Lorain v. Gel-Pak, Inc.* (1984), 20 Ohio App.3d 378, 486 N.E.2d 836; *Deercreek Local Bd. of Edn. v. Payne* (1949), 86 Ohio App. 319, 41 O.O. 368, 88 N.E.2d 226.

When an answer is filed pursuant to section 163.08 of the Revised Code and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five or more than fifteen days from the date the answer was filed, to hear such questions. Upon such questions, the burden of proof is upon the owner. R.C. 163.09(B).

3. COMPENSATION. Compensation is payment of the fair market value of the property taken.

4. DAMAGES. Damages are the loss in value of the residue of the property because of its severance from the property taken (because of the imposition of the easement).

5. DATE OF TAKE. Compensation (and damages to residue, if any) shall be determined as of the . . . . . day of . . . . . , ... , which is referred to as the "date of take."

COMMENT

This date must be fixed by the Court prior to trial. The date of take is date of trial or an earlier date when the appropriator took possession of the property, began condemnation proceedings or actions of the appropriator depreciated the

property. The burden of proof is upon the owner to provide a date prior to trial date. *Evans v. Hope* (1984), 12 Ohio St.3d 119, 465 N.E.2d 869; *Becos v. Masheter* (1968), 15 Ohio St.2d 15, 44 O.O.2d 9, 238 N.E.2d 548; *Director of Hwys. v. Olrich* (1966), 5 Ohio St.2d 70, 34 O.O.2d 153, 213 N.E.2d 823 and *Richley v. Van Horneff* (1973), 38 Ohio App.2d 22, 67 O.O.2d 162, 311 N.E.2d 37.

6. OWNER. "Owner" includes any (individual) (partnership) (association) (corporation) having any estate, title or interest in any real property sought to be appropriated.

COMMENT

R.C. 163.01(C).

R.C. 163.13 provides no delay in the proceedings shall be occasioned by doubt as to the ownership of any property or as to the interest of respective owners.

The owner of the property is entitled to express an opinion on the value of the property. The weight of owner testimony is for the jury. *Ohio Turnpike Comm. v. Ellis* (1955), 164 Ohio St. 377, 58 O.O. 179, 131 N.E.2d 397.

Instructions as to evidence, credibility of witness, expert witnesses and the usual "boiler plate" are not repeated here. They are all set forth in the standard instructions in OJI-CV Chapter 305.

CV 609.03 View of property

See OJI-CV 309.15.

COMMENT

R.C. 163.12 requires a view of premises upon request, but in the event a substantial change has occurred in the property or its surroundings making a view prejudicial to a party, the Court may deny a request for a view. *Akron v. Alexander* (1966), 5 Ohio St.2d 75, 34 O.O.2d 155, 214 N.E.2d 89.

CV 609.05 Compensation

1. FAIR MARKET VALUE. You will award to the property owner(s) the amount of money you determine to be the fair market value of the property taken. Fair market value is the amount of money which could be obtained on the market at a voluntary sale of the property. It is the amount a purchaser who is willing, but not required to buy, would pay and that a seller who is willing, but not required to sell, would accept, when both are fully aware and informed of all the circumstances involving the value

and use of the property. You should consider every element that a buyer would consider before making a purchase. You should take into consideration the location, surrounding area, quality and general condition of the premises, the improvements thereon and everything that adds to or detracts from the value of the property.

COMMENT

Masheter v. Kebe (1976), 49 Ohio St.2d 148, 3 O.O.3d 86, 359 N.E.2d 74.

2. HIGHEST AND BEST USE. The property must be valued at its worth for the most valuable use which it may reasonably, lawfully and practically be used. This is called highest and best use.

COMMENT

See *In re Appropriation for Highway Purposes* (1969), 20 Ohio St.2d 43, 49 O.O.2d 242, 252 N.E.2d 643; *Masheter v. Kebe, supra*; *Board of Cty. Commrs. v. Thormyer* (1959), 169 Ohio St. 291, 8 O.O.2d 294, 159 N.E.2d 612; *Norwood v. Forest Converting Co.* (1984), 16 Ohio App.3d 411, 476 N.E.2d 695. For specific issues about potential use see OJI-CV 609.07.

3. NO INCREASE OR DECREASE. The value is not to be increased or decreased because of the necessity of (*name the appropriating body*) to take the property nor because these proceedings require the owners to part with their property, nor because of any benefits that may accrue to the owners because of the (*refer to the nature of the project*).

COMMENT

See DAMAGES OJI-CV 609.09.

4. EASEMENT. If any of the property taken is subject to an existing easement for public purposes, such property has no substantial value and only nominal compensation may be awarded for it. "Nominal" means trifling or small, usually $10.00 or less.

COMMENT

Fogle v. Richley (1978), 55 Ohio St.2d 142, 9 O.O.3d 115, 378 N.E.2d 472; *Preston v. Stover Leslie Flying Serv., Inc.* (1963), 174 Ohio St. 441, 23 O.O.2d 100, 190 N.E.2d 446; *Lacey v. Laird* (1956), 166 Ohio St. 12, 1 O.O.2d 158,139 N.E.2d 25; and *Masheter v. Ohio Holding Co.* (1973), 38 Ohio App.2d 49, 67

O.O.2d 262, 313 N.E.2d 413.

CV 609.07 Issues concerning potential use

COMMENT

These issues may arise as to either compensation or damages, or both.

1. UNDEVELOPED LOTS. Undeveloped lots in an existing subdivision are to be valued as one parcel, but individual lot value may be considered to arrive at the market value of the entire parcel.

COMMENT

For factors of value of lots, *In re Appropriation for Highway Purposes of Lands of Lunsford* (1968), 15 Ohio App.2d 131, 44 O.O.2d 258, 239 N.E.2d 110; but see *Toledo Edison Co. v. Roller* (1974), 46 Ohio App.2d 61, 75 O.O.2d 60, 345 N.E.2d 430.

2. POTENTIAL USE. Potential use of the (property taken) (residue) may be considered, but a potential use must be one legally permissible within the reasonably foreseeable future and not dependent upon contingencies.

COMMENT

Masheter v. Kebe (1976), 49 Ohio St.2d 148, 3 O.O.3d 86, 359 N.E.2d 74;
Masheter v. Wood (1973), 36 Ohio St.2d 175, 65 O.O.2d 397, 305 N.E.2d 785;
Masheter v. Blaisdell (1972), 30 Ohio St.2d 8, 59 O.O.2d 48, 282 N.E.2d 42.

3. EXISTING ZONING. Zoning may be a significant factor in determining potential use. Compensation must be based upon the market value for the highest and best use lawful under existing zoning regulations.

4. POSSIBLE ZONING CHANGE. Holding property for future development in anticipation of a zoning change allowing a more valuable use of the property, is a permitted use. If an informed and willing purchaser would be presently agreeable to pay more than the amount justified under existing zoning, hoping for a zoning change, that is the fair market value of the property. The jury may consider factors in evidence indicating a likelihood of a zoning change as those factors may reflect upon the fair market value of the property.

COMMENT

Drawn from *Masheter v. Kebe* (1976), 49 Ohio St.2d 148, 3 O.O.3d 86, 359 N.E.2d 74 and *Masheter v. Wood* (1973), 36 Ohio St.2d 175, 65 O.O.2d 397, 305 N.E.2d 785. Evidence of a possible change in a zoning classification may be too speculative to be admissible. A property owner is entitled to what the property would sell for on the open market. Factors relating to the possibility of a zoning change may be admissible if they would cause a prospective purchaser to pay more for the property.

CV 609.09 Damages

1. DAMAGES. OJI-CV 609.01 § 4.

2. ADDITIONAL. In addition to the compensation for the property taken, the owner is entitled to any decrease in the fair market value of the (residue) (remaining land) that is a direct result of the appropriation. If the (remaining land) (residue) is less valuable because of the (severance) (appropriation), then you must consider such injury and determine the amount of such decrease in the fair market value caused by the (severance) (appropriation) (separation of the land taken). This will be the amount awarded for damages to the (residue) (separation of the land taken).

3. BENEFITS.

COMMENT

"Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." Section 19, Article I, Ohio Constitution.

"No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law." Section 5, Article XIII, Ohio Constitution. But see *Lotze v. Cincinnati* (1899), 61 Ohio St. 272, 55 N.E. 828; *Little Miami RR. Co. v. Collett* (1856), 6 Ohio St. 182 and *Richley v. Bowling* (1972), 34 Ohio App.2d 200, 63 O.O.2d 368, 299 N.E.2d 288.

The courts speak of general benefits and special benefits. There is no question general benefits are not deducted from an award.

Special benefits have been construed strictly. No reported cases have been found that have allowed a deduction for special benefits.

4. ADDITIONAL. Damage to the residue resulting from the exercise of eminent domain may be recovered only for damages not common to the public. Consequential damages such as (noise) (vibration) (circuity of travel) (loss of traffic volume) (dust and inconvenience suffered by the owner in common with the public) are not to be considered.

COMMENT

Richley v. Jones (1974), 38 Ohio St.2d 64, 67 O.O.2d 78, 310 N.E.2d 236; *Norwood v. Forest Converting Co.* (1984), 16 Ohio App.3d 411, 476 N.E.2d 695; *In re Appropriation of Easements from Leas* (1981), 5 Ohio App.3d 120, 449 N.E.2d 780; *Masheter v. Yake* (1967), 9 Ohio App.2d 327, 38 O.O.2d 384, 224 N.E.2d 540, paragraph four of the syllabus.

5. MINIMIZATION OF DAMAGES. If by the expenditure of money in an amount less than the difference between the fair market value of the residue before the taking and the fair market value of the residue after the taking, the property owner can make improvements to the residue to restore its fair market value, such "cost of cure" if proved, limits the amount of damages to be assessed.

COMMENT

"If, for example, property left after a street improvement in an unsightly condition should be estimated to be worth $1,000 less than before the improvement, and by the expenditure of $100 the property could be restored to its former value, the property owner would be made fully whole by the payment of $100, and the cost of alterations and adjustments should then become the measure of damages." *Gohman v. St. Bernard* (1924), 111 Ohio St. 726, 753, 146 N.E. 291. Also *Columbus v. Farm Bureau Coop. Assn* (1971), 27 Ohio App.2d 197, 56 O.O.2d 382, 273 N.E.2d 888; and *In re Appropriation for Highway Purposes* (1968), 15 Ohio App.2d 139, 44 O.O.2d 283, 239 N.E.2d 412.

6. Construction plans and agreement for the project have been placed in evidence and should be considered by the jury in assessing damages. These plans and specifications, including commitments by the appropriator to (furnish) (construct) . . . . . (*state appropriate specification[s] in the plans*) will be contained in the Judgment Entry in this case and can be enforced by the property owner.

7. FUTURE ADDITIONAL USE. If an additional future use is made of the property

appropriated other than uses reasonably foreseeable from the present plans (and agreement) further compensation may be obtained by the property owner in another proceeding.

COMMENT

"In a highway appropriation proceeding, where a perpetual easement for highway purposes is sought, the proper standard by which damages to the residue of the landowner's property are to be measured is one which limits allowable damages to those which are reasonably foreseeable." *Masheter v. Blaisdell* (1972), 30 Ohio St.2d 8, 59 O.O.2d 48, 282 N.E.2d 42, paragraph one of the syllabus.

CV 609.11 Structures removed prior to trial

1. Structure(s) that (was) (were) on the land on (*date of take*) (has) (have) been removed. The statute provides an appraisal of the structure(s) be made by three appraisers, one chosen by the County Auditor and one chosen by each of the parties. None of the appraisals is binding upon any of the parties but they, along with the pictures and description of the structure(s), are in evidence for your consideration.

COMMENT

R.C. 163.06 requires appraisals, pictures and description.

"When a building or other structure is on the property appropriated or when a building or other structure is situated partly upon the land appropriated and partly on the adjoining land so that the structure cannot be divided upon the line between such lands without manifest injury thereto the jury in assessing compensation to any owner of the land shall assess the value thereof as part of the compensation." R.C. 163.14. For use inconsistent with or additional use of easements see OJI-CV 609.09 § 4.

CV 609.13 Easements

1. GENERAL. An easement is the right of one to use land of another for a particular purpose. It does not confer ownership of the land, only the right to use the land for the purpose of (*describe the use in the case*). The owner may use the area of the easement for all purposes consistent with the easement.

COMMENT

An additional or substituted public use of an existing easement may not require additional compensation. *Centel Cable Television Co. of Ohio, Inc. v. Cook* (1991), 58 Ohio St.3d 8, 567 N.E.2d 1010; *Fogle v. Richley* (1978), 55 Ohio St.2d 142, 9 O.O.3d 115, 378 N.E.2d 472, and *Ziegler v. Ohio Water Serv.*

Co. (1969), 18 Ohio St.2d 101, 47 O.O.2d 244, 247 N.E.2d 728.

2. COMPENSATION. OJI-CV 609.05.

3. LIMITATION. Compensation for an easement is limited to the fair market value of the land area covered by the easement.

4. DAMAGES. OJI-CV 609.09.

(A) The measure of damages is the difference in the fair market value of the whole parcel free of the easement and its fair market value burdened with the easement. In assessing damages you may take into consideration the uses the owner may have of the easement area.

(B) The appropriator of the easement may without further compensation to the owner enter upon the easement for repair, service and maintenance of its facility.

(C) UNDERGROUND GAS STORAGE EASEMENT.

COMMENT

For suggested methods of valuation of underground gas storage easements, see *Columbia Gas Transm. Corp. v. An Exclusive Natural Gas Storage Easement* (1993), 67 Ohio St.3d 463, 620 N.E.2d 48, issued under S.Ct.Prac.R. XVIII.

5. TEMPORARY EASEMENT. A temporary easement is the right to use an area of land for a limited time and limited purposes. The measure of (compensation) (damages) for a temporary taking is the fair market value of the loss of use of the property taken. That fair market value is the (lost rent) (fair rental value).

COMMENT

For rented property use "lost rents"; otherwise use "fair rental value." *Norwood v. Sheen* (1933), 126 Ohio St. 482, 186 N.E. 102. If fair market value instruction is required modify OJI-CV 609.05 § 1.

CV 609.15 Fixtures

1. A fixture is (an article of personal property) (a chattel) which by being attached to realty became accessory to it and a part of it.

2. The (*describe*) is a fixture. If the fixture(s) is (are) removable by the owner, the land with fixtures is valued by reducing the value of the land by the value of the fixtures, but the owner is entitled to the cost of removal of personal property.

COMMENT

Whether an item has lost its identity as personal property and is part of the real estate is usually a question of law to be determined by the Court. *Masheter v. Boehm* (1974), 37 Ohio St.2d 68, 66 O.O.2d 183, 307 N.E.2d 533.

It is error to admit evidence of a lessee's expense in removing or reinstalling personal property (as opposed to fixtures) or establishing new quarters. *Lucas v. Carney* (1958), 167 Ohio St. 416, 5 O.O.2d 63, 149 N.E.2d 238; *Thormyer v. Joseph Evans Ice Cream Co.* (1958), 167 Ohio St. 463, 5 O.O.2d 149, 150 N.E.2d 30.

CV 609.17 Natural assets

1. (Minerals) (Ore) (Coal) (Gravel) (Stone) (Oil) (Gas) (is) (are) a natural asset which (is) (are) to be considered in determining the market value of the land. Such asset may affect the value of the land if a reasonable seller would demand more for the land and a reasonable buyer would pay more for the land because of it.

2. The market value of the land may not be reached by combining separately evaluated land and its (*describe natural asset*).

COMMENT

Preston v. Stover Leslie Flying Serv., Inc. (1963), 174 Ohio St. 441, 23 O.O.2d 100, 190 N.E.2d 446; *Tennessee Gas Transm. Co. v. Wolfe* (1953), 159 Ohio St. 391, 50 O.O. 350, 112 N.E.2d 376.

3. Standing timber (crops) is (are) a part of the land and shall be considered in determining the value of the (land taken) (residue).

COMMENT

Board of Park Commrs. v. DeBolt (1984), 15 Ohio St.3d 376, 474 N.E.2d 317.

CV 609.19 Special use property

COMMENT

Public properties, hospitals, cemeteries, churches, golf courses and factories cannot be valued by usual appraisal and sale methods. *Masheter v. Cleveland Bd. of Edn.* (1969), 17 Ohio St.2d 27, 46 O.O.2d 197, 244 N.E.2d 745, and *Board of Cty. Commrs. v. Thormyer* (1959), 169 Ohio St. 291, 8 O.O.2d 294, 159 N.E.2d 612. *Richley v. Van Horneff* (1973), 38 Ohio App.2d 22, 67 O.O.2d 162, 311 N.E.2d 37.

For suggested methods of valuation of such properties see 4 Nichols, Eminent Domain, (Supp. 1989) Section 12 C.01 [1-5].

CV 609.21 Conclusion

1. The evidence has provided you with the factors for you to arrive at a fair verdict. The weight you assign to the various parts of the evidence is for you to decide in arriving at a fair verdict.

2. The authority you have to award compensation (and damages) must be exercised with sincere and honest judgment, without bias or prejudice and in accordance with the evidence and the law as it has been explained to you.

3. VERDICTS. OJI-CV 609.23.

4. QUOTIENT VERDICT. OJI-CV 315.41.

5. CLOSING. OJI-CV Chapter 317.

CV 609.23 Verdict

COMMENT

The verdict forms must be tailored for the particular case, whether there is a temporary easement or a residue. It is error to have the jury award separate compensation for land and improvements, structures and fixtures. *Masheter v. Boehm* (1974), 37 Ohio St.2d 68, 66 O.O.2d 183, 307 N.E.2d 533.

1. You will have one verdict form to complete. On the line marked "compensation" you enter in dollars and cents the sum you determine to be the fair market value of the land taken (including the structures on that land) (temporary easement). On the next line you will enter in dollars and cents the amount of any damages you determine is resulting to the residue of the land. On the third line you will enter the total amount which will constitute your award.

2. Six or more of the eight jurors (nine or more of the twelve jurors) must agree in order to reach a verdict, and those agreeing should sign the verdict on the lines provided.

3. VERDICT FORM. We, the jury, being duly impaneled and sworn, by the concurrence of the undersigned jurors, being no less than three-fourths of our number, do assess the award to be paid by the Plaintiff to the Defendants, as follows:

1. Compensation for property taken $_____
2. Damages to the residue, if any $_____
3. Total award $_____

Those jurors concurring in this verdict have signed their names this _____ day of _____, _____.

(Signature lines)

4. VERDICT FORM: TEMPORARY TAKE. We, the jury, being duly impaneled and sworn, by the concurrence of the undersigned jurors, being no less than three-fourths of our number, do assess the award to be paid by the Plaintiff to the Defendants, as follows:

1. Compensation for property taken	$_____
2. Compensation for temporary easement(s)	$_____
3. Damages to residue, if any	$_____
4. Total award	$_____

Those jurors concurring in this verdict have signed their names this _____ day of _____, _____.

(Signature lines)

Chapter CV 613

LANDLORDS, TENANTS

CV 613.01	Residential eviction (non-payment of rent)
CV 613.03	Residential eviction (breach of tenant obligation)
CV 613.05	Residential eviction (illegal drug activity)
CV 613.07	Return of security deposit
CV 613.09	Manufactured home park eviction (retaliatory conduct of park operator)
CV 613.11	Affirmative defense to manufactured home park eviction (retaliatory conduct of park operator)
CV 613.13	Manufactured home park eviction (non-payment of rent)
CV 613.15	Resident's claim for damages (violation of obligation of park operator)
CV 613.17	Manufactured home park operator's claim for damages (violation of statutory obligations of resident)
CV 613.19	Manufactured home park eviction (termination of term resulting from sale of park)
CV 613.21	Manufactured home park eviction (owner holding over term)
CV 613.23	Manufactured home park eviction (tenant holding over term)
CV 613.25	Resident's claim for damages (prohibited conduct of park operator)
CV 613.27	Manufactured home park eviction (first violation of rules of park, health council or health and safety code)
CV 613.29	Manufactured home park eviction (second violation of rules of park, health council or health and safety code)
CV 613.31	Resident's claim for damages (illegal acts of park operator to recover rent or possession of premises)
CV 613.33	Resident's claim for return of security deposit

CV 613.01 Residential eviction (non-payment of rent) R.C. 1923.02

COMMENT

This instruction is to be used in residential eviction cases where the landlord claims that the tenant has failed to pay rent. OJI-CV Chapter 613 contains other instructions where the eviction is based upon other allegations.

This instruction with modification may be used in manufactured home eviction cases where it is alleged that the manufactured home park resident has failed to pay rent.

1. The plaintiff seeks to recover possession of the premises located at (*insert address*), _____ County, Ohio from the defendant who is the tenant. To recover possession of the premises, the plaintiff must prove by the greater weight of the evidence that:

(A) The plaintiff is the landlord; and

COMMENT

Although the plaintiff need not be the owner of the premises, the plaintiff must prove a right to possession superior to that of the defendant such as in the case of a lessee evicting a sub-lessee. See R.C. 1923.01(C)(2) for the definition of "landlord."

(B) The plaintiff and the defendant entered into a rental agreement; and

(C) The defendant has failed to pay rent when it was due; and

(D) The plaintiff delivered a written notice to the defendant three or more days before beginning the legal action advising the defendant of plaintiff's intent to begin legal proceedings for the removal of the defendant from the premises.

COMMENT

If there is no factual dispute about delivery or receipt of the required statutory notice, paragraph (D) of this instruction need not be given. See *Barr Hotel Co. v. Lloyd MacKeown Buick Co.* (1957), 104 Ohio App. 69, 4 O.O.2d 157, 146 N.E.2d 879; *Sternberg v. Washington* (1960), 113 Ohio App. 216, 17 O.O.2d 185, 177 N.E.2d 525.

Where it is claimed that the tenant holding the premises under an oral tenancy or pursuant to a written lease has failed to pay rent, only a three-day notice is required. See R.C. 1923.02(A)(2), 1923.02(A)(9), 1923.02(B), and 1923.04. *Parker v. Fisher* (1984), 17 Ohio App.3d 103, 477 N.E.2d 654.

2. ADDITIONAL CLAIM.

(*Use if appropriate*)

The plaintiff also seeks to recover damages from the defendant for (*describe nature of claim*).

COMMENT

For additional language, reference should be made to OJI-CV Chapter 501 CONTRACTS. Caution should be used in drafting instructions which apply to

the specific issues at trial.

3. TENANT. R.C. 1923.01(C)(1).

4. LANDLORD. R.C. 1923.01(C)(2).

5. RENTAL AGREEMENT. R.C. 1923.01(C)(5).

6. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff is the landlord, that the plaintiff and defendant entered into a rental agreement, that the defendant failed to pay rent to the plaintiff, and the plaintiff delivered a three-day notice to the defendant, then you must find in favor of the plaintiff. On the other hand, your verdict must be for the defendant if you find that the plaintiff has failed to prove any of the required elements.

7. DAMAGES. OJI-CV 501.33, OJI-CV 501.35.

CV 613.03 Residential eviction (breach of tenant obligation) R.C. 5321.05

COMMENT

This instruction is to be used when the landlord claims that there has been a violation of the statutory duties imposed by R.C. 5321.05 that materially affects health and safety and he is seeking to terminate the tenancy pursuant to R.C. 1923.02(A)(8).

For residential evictions involving illegal drug activity, see OJI-CV 613.05.

1. The plaintiff seeks to recover possession of the premises located at (*insert address*), _____ County, Ohio from the defendant who is the tenant. To recover possession of the premises the plaintiff must prove by the greater weight of the evidence that:

(A) The plaintiff is the landlord; and

(B) The plaintiff and the defendant entered into a rental agreement; and

(C) The defendant

(*Use appropriate alternative*)

COMMENT

Note that the plaintiff must prove sections (A) through (G) including the appropriate subsection of (C).

(1) failed to keep the part of the premises he occupies and uses safe and sanitary,

and the failure materially affected health and safety.

(2) failed to dispose of all (rubbish) (garbage) (waste) in a clean, safe, and sanitary manner, and the failure materially affected health and safety.

(3) failed to keep all plumbing fixtures in the dwelling unit or used by the defendant as clean as their condition permits, and the failure materially affected health and safety.

(4) failed to use and operate all electrical and plumbing fixtures properly, and the failure materially affected health and safety.

(5) failed to comply with the requirements imposed on tenants by (*insert the applicable housing, health, or safety code[s] claimed to have been violated*), and the failure materially affected health and safety.

(6) personally failed to (refrain) (forbid other persons who are on the premises with the defendant's permission) from intentionally or negligently (destroying) (defacing) (damaging) (removing) any (fixture) (appliance) (other part of the premises), and the failure materially affected health and safety.

(7) failed to maintain in good working order and condition the (*specify appliance*) which was supplied by the plaintiff and required to be maintained by the defendant under the terms of a written rental agreement, and the failure materially affected health and safety.

(8) failed to (conduct himself) (require others on the premises with the defendant's consent to conduct themselves) in a manner that did not disturb his neighbors' peaceful enjoyment of the premises, and the failure materially affected health and safety.

(9) unreasonably withheld consent for the plaintiff to enter into the dwelling unit in order to (inspect the premises) (make ordinary, necessary, or agreed repairs, decorations, alterations, or improvements) (deliver parcels that are too large for the defendant's mail facilities) (supply necessary or agreed services) (exhibit the dwelling unit to a prospective or actual purchaser, mortgagee, tenant, workman, or contractor), and the withholding materially affected health and safety.

COMMENT

For requirements concerning the inspection of the premises, see R.C. 5321.04(A)(8).

(D) The plaintiff delivered a written notice to the defendant advising the defendant that the rental agreement would end after the expiration of _____ days from the receipt of the notice if the defendant failed to remedy the condition.

COMMENT

Drawn from R.C. 5321.11 which requires no less than a thirty day notice for R.C. 5321.05 violations except for a violation of R.C. 5321.05(A)(9). If there is no factual dispute about delivery and receipt of this notice, this instruction should not be given.

(E) The defendant failed to correct the condition.

(F) The plaintiff delivered a written notice to the defendant (by certified mail, return receipt requested) (by handing a written copy to him) (by leaving it at the defendant's usual place of abode) (by leaving it at the premises from which the defendant is sought to be evicted) on or before (*insert that date which is three days before the filing of complaint*) advising the defendant of plaintiff's intention to begin legal proceedings for the removal of the defendant from the premises.

COMMENT

Drawn from R.C. 1923.04. If there is no factual dispute about delivery of this statutory notice, this instruction should not be given. See *Sternberg v. Washington* (1960), 113 Ohio App. 216, 17 O.O.2d 185, 177 N.E.2d 525; *Barr Hotel Co. v. Lloyd MacKeown Buick Co.* (1957), 104 Ohio App. 69, 4 O.O.2d 157, 146 N.E.2d 879.

When it is claimed that there is a violation of an obligation imposed upon a tenant pursuant to R.C. 5321.05 and the violation is relied upon by the landlord as grounds for termination of the rental agreement, the landlord must give a thirty-day notice pursuant to R.C. 5321.11 and thereafter the three-day notice required by R.C. 1923.04. *Parker v. Fisher* (1984), 17 Ohio App.3d 103, 477 N.E.2d 654.

(G) The defendant did not leave the premises.

2. ADDITIONAL CLAIM.

(*Use if appropriate*)

The plaintiff also seeks to recover damages from the defendant for (*describe nature of claim*).

COMMENT

R.C. 5321.05(C)(1) provides that a landlord may recover any actual damages that result from a violation of the tenant's obligations in addition to the right to terminate the rental agreement. For additional language, reference should be made to OJI-CV Chapter 501 CONTRACTS.

See R.C. 1923.081 for authority to try the eviction claim and the damages

claim together.

3. ATTORNEY FEES. If you find there was proof of actual damages you may consider and include in the amount of actual damages a reasonable amount for attorney fees of counsel employed by the plaintiff in the prosecution of the claim(s) giving rise to actual damages.

COMMENT

R.C. 3733.11(I) permits the resident to recover actual damages and if a judgment is obtained reasonable attorney fees. It will be necessary to draft jury instructions applicable to the particular injury or damages claimed. See OJI-CV Chapter 315.

The Committee believes that the determination of amount of any attorney fees may, but need not, be submitted to the jury. See Comment at OJI-CV 315.37 (on and after 4-7-05) § 10 Attorney Fees. If the issue is submitted to the jury, see OJI-CV 315.39, Reasonableness of attorney fees.

For an instruction on the factors to be considered in determining the reasonableness of attorney fees, see OJI-CV 315.39.

4. TENANT. R.C. 5321.01(A).

5. LANDLORD. R.C. 5321.01(B).

6. RENTAL AGREEMENT. R.C. 5321.01(D).

7. DWELLING UNIT. R.C. 5321.01(F).

8. MATERIALLY. "Materially" means significantly.

9. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff has proved all of the elements of his claim, you must find for the plaintiff. On the other hand, your verdict must be for the defendant if you find that the plaintiff failed to prove by the greater weight of the evidence any of the required elements.

10. DAMAGES. OJI-CV 501.33, OJI-CV 501.35.

11. VERDICT FORM. "In addition to actual damages, the jury makes an additional award of $_____ as reasonable attorney fees."

COMMENT

The Committee is of the opinion that the foregoing complies with the language of R.C. 5321.05(C)(1).

CV 613.05 Residential eviction (illegal drug activity) R.C. 5321.04(A)(9) and R.C. 5321.05(A)(9)

COMMENT

This instruction is to be used only in residential eviction cases where it is alleged that the tenant has violated R.C. 5321.05(A)(9) and the landlord is seeking to terminate the tenancy pursuant to R.C. 5321.04(A)(9) and R.C. 1923.02(A)(6)(a)(i).

The landlord need not prove that the R.C. 5321.05(A)(9) violation affected health and safety. R.C. 1923.02(A)(8).

1. The plaintiff seeks to recover possession of the premises located at (*insert address*), _____ County, Ohio from the defendant who is the tenant. To recover possession of the premises, the plaintiff must prove by the greater weight of the evidence that:

(A) The plaintiff is the landlord; and

(B) The plaintiff and the defendant entered into a rental agreement; and

(C) The plaintiff was informed by a law enforcement officer that (the defendant) (a person in the defendant's household) (a person on the premises with the defendant's consent) had been or is presently engaged in illegal drug activity in or connected with the defendant's premises.

COMMENT

The Committee believes that the language of R.C. 1923.02(A)(6) requires the court to make the determinations whether, by a preponderance of the evidence, illegal drug activity has occurred, whether a search warrant was validly issued and executed, and whether a controlled substance was found on the premises. This leaves for the jury's determination only whether the landlord was informed by a law enforcement officer.

R.C. 1923.06(A)(6)(a)(i) requires the landlord to have "actual knowledge of or reasonable cause to believe" that illegal drug activity has occurred.

Because of the language used by the legislature, the Committee takes no position about whether actual knowledge or reasonable cause to believe can be proved by any circumstances, other than those described in the statute.

(D) The plaintiff delivered a written notice to the defendant (by certified mail, return receipt requested) (by handing a written copy to him) (by leaving it at the defendant's usual place of abode) (by leaving it at the premises from which the defendant is sought to be evicted) on or before (*insert that date which is three days*

before the filing of the complaint) advising the defendant of the plaintiff's intention to begin legal proceedings for the removal of the defendant from the premises.

COMMENT

Drawn from R.C. 1923.04(B) and 5321.17(C). If there is no factual dispute about delivery of this statutory notice, this instruction should not be given. See *Sternberg v. Washington* (1960), 113 Ohio App. 216, 17 O.O.2d 185, 177 N.E.2d 525; *Barr Hotel Co. v. Lloyd MacKeown Buick Co.* (1957), 104 Ohio App. 69, 4 O.O.2d 157, 146 N.E.2d 879.

If the landlord has "actual knowledge of or has reasonable cause to believe" that the defendant is or was engaged in illegal drug activity in or connected with the premises, no thirty-day notice is required. R.C. 5321.04(A)(9) and 5321.17.

The Committee believes that the three-day notice as provided by R.C. 5321.17(C) must be served and worded in accordance with R.C. 1923.04(A).

It is not a condition precedent that the tenant or other person has been charged with, has pleaded guilty to, has been convicted of, or has been determined to be a delinquent child as a result of the alleged illegal drug activity which forms the basis for the eviction. R.C. 1923.02(A)(6)(a)(i).

(E) The defendant remains in the premises.

2. TENANT. R.C. 5321.01(A).

3. LANDLORD. R.C. 5321.01(B).

4. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff proved all of the elements of his claim, you must find for plaintiff. On the other hand, your verdict must be for the defendant if you find that the plaintiff failed to prove by the greater weight of the evidence any of the required elements.

5. DAMAGES AND ATTORNEY FEES.

COMMENT

Unlike the other provisions of R.C. 5321.05, if the tenant violates R.C. 5321.05(A)(9), the landlord may not recover actual damages or attorney fees. R.C. 5321.05(C)(1).

CV 613.07 Return of security deposit R.C. 5321.16

COMMENT

These instructions are to be used only in those situations where the residential tenant is demanding a return of the security deposit together with the statutory

damages as provided in R.C. 5321.16(C).

If the plaintiff fails to provide any evidence that he furnished a forwarding address to the defendant, § 1(D) should be deleted and § 10 appropriately modified.

1. The plaintiff who is the tenant seeks to recover from the defendant who is the landlord (the security deposit) (that part of the security deposit) which the plaintiff claims was wrongfully withheld by the defendant. To recover, the plaintiff must prove to you by the greater weight of the evidence that

(A) the plaintiff and defendant entered into a rental agreement for residential premises located at (*insert address*), _____ County, Ohio; and

(B) as provided by the terms of the rental agreement, the plaintiff deposited with the defendant the amount of $_____ as a security deposit; and

(C) on the _____ day of _____, _____ the rental agreement was terminated and the possession of the premises was delivered to the defendant;

(D) the plaintiff provided to the defendant in writing a (forwarding address) (new address); and

COMMENT

R.C. 5321.16(B) states that the failure of the tenant to give this notice will bar the tenant from recovering the statutory double damages and attorney fees as provided in R.C. 5321.16(C). Ohio courts have disagreed on whether the tenant must strictly comply with the writing requirement to recover the amount wrongfully withheld. In *Prescott v. Makowski* (1983), 9 Ohio App.3d 155, 458 N.E.2d 1281, the court held that a landlord's statutory duty to return any security deposit within thirty days, or within that time to supply the tenant with an itemized list of claimed deductions together with the balance of that deposit, applies when the landlord has actual knowledge of the tenant's subsequent residence, even if the tenant has failed to supply that address in writing. Other courts have held that the tenant's failure to give written notice of a forwarding address constitutes noncompliance even where the landlord has actual knowledge of the new address. See *Waldenmyer Ent. v. Bolek* (May 28, 1987), Tuscarawas App. No. 86AP100070, unreported.

(E) the defendant did not return (all) (a part of) the security deposit.

2. TENANT. R.C. 5321.01(A).

3. LANDLORD. R.C. 5321.01(B).

4. RENTAL AGREEMENT. R.C. 5321.01(D).

5. RESIDENTIAL PREMISES. R.C. 5321.01(C).

6. SECURITY DEPOSIT. R.C. 5321.01(E).

7. OFFSET: STATUTORY DEDUCTION.

(*Use if appropriate*)

The defendant claims that he is entitled to keep (all) (a part of) the security deposit because of (past due rent) (damages suffered by the defendant because plaintiff failed to comply with [*insert statutory duty pursuant to R.C. 5321.05*] [the rental agreement]). If you find by the greater weight of the evidence that the plaintiff owes to the defendant an amount of money for (past due rent) (damages suffered by the defendant because the plaintiff failed to comply with [*insert statutory duty pursuant to R.C. 5321.05*] [the rental agreement]), then the defendant is entitled to an (offset) (credit) (deduction).

COMMENT

The burden of proof and the burden of going forward with the evidence concerning an offset is upon the landlord.

If the tenant complies with R.C. 5321.16(B) and the landlord fails to comply with that section, the landlord is not precluded from maintaining an action under R.C. 5321.05 and 5321.12 for damage to the property caused by the tenant. *Sherwin v. Cabana Club Apts.* (1980), 70 Ohio App.2d 11, 24 O.O.3d 11, 433 N.E.2d 932.

If the landlord has filed a counterclaim and is making an affirmative claim for an amount in excess of the amount claimed by the tenant, proper instructions must be given to the jury and the offset instructions should not be used.

8. OFFSET: WASTE.

(*Use if appropriate*)

The defendant (claims) (also claims) that he is entitled to keep (all) (a part of) the security deposit because of (waste) (excessive wear and tear) caused by the plaintiff. The plaintiff shall return the premises in substantially the same condition as when received, ordinary wear and tear excepted. Ordinary wear and tear is caused by reasonable use of the premises under all the facts and circumstances in evidence. If you find by the greater weight of the evidence that the plaintiff caused damages to the premises which exceed ordinary wear and tear, then the defendant is entitled to an (offset) (credit) (deduction).

9. CONCLUSION. If you find by the greater weight of the evidence that the defendant wrongfully withheld (all) (a part of) the security deposit, then your verdict must be for the plaintiff and you will proceed to determine what amount of money should be awarded to the plaintiff. The amount "wrongfully withheld" is the amount of the security deposit less any (offset) (credit) (deduction). On the other hand, if you find by the greater weight of the evidence that the defendant did not wrongfully withhold any part of the security deposit, then your verdict must be for the defendant.

10. DAMAGES. If you find that the defendant wrongfully withheld (all) (a part of) the security deposit and if you find that the plaintiff provided to the defendant in writing a (forwarding) (new) address, then you shall award to the plaintiff the (property) (money) due to the plaintiff together with (additional) damages in an amount equal to the amount wrongfully withheld and reasonable attorney fees. You shall not, however, permit this award of (additional) damages to affect your determination of the amount wrongfully withheld. If you find that the defendant wrongfully withheld (all) (a part of) the security deposit but you find that the plaintiff did not provide in writing a (forwarding) (new) address, then you should award to the plaintiff only the (property) (money) wrongfully withheld.

COMMENT

As to the issue of actual or written notice, see comment at § 1(D) above.

The failure to comply with R.C. 5321.16(B) renders the landlord liable for double damages only as to the amount wrongfully withheld and not as to the entire amount of the security deposit. The double damages provision of R.C. 5321.16(C) is mandatory and there is no discretion in fixing the amount. *Vardeman v. Llewellyn* (1985), 17 Ohio St.3d 24, 476 N.E.2d 1038. See also *Forquer v. Colony Club* (1985), 26 Ohio App.3d 178, 499 N.E.2d 7.

This is true regardless of whether the landlord gave the tenant an itemized list of deductions from the deposit. *Smith v. Padgett* (1987), 32 Ohio St.3d 344, 513 N.E.2d 737.

An award of double damages against a landlord for wrongful withholding of a security deposit under a residential rental agreement does not constitute an award of "punitive damages." *Klemas v. Flynn* (1993), 66 Ohio St.3d 249, 611 N.E.2d 810.

R.C. 3733.11(I) permits the resident to recover actual damages and if a judgment is obtained reasonable attorney fees. It will be necessary to draft jury instructions applicable to the particular injury or damages claimed. See OJI-CV Chapter 315.

The Committee believes that the determination of amount of any attorney fees may, but need not, be submitted to the jury. See Comment at OJI-CV 315.37 (on and after 4-7-05) § 10 Attorney Fees. If the issue is submitted to the jury, see OJI-CV 315.39, Reasonableness of attorney fees.

For an instruction on the factors to be considered in determining the

reasonableness of attorney fees, see OJI-CV 315.39.

CV 613.09 Manufactured home park eviction (retaliatory conduct of park operator) R.C. 3733.09

COMMENT

If a park operator violates R.C. 3733.09(A) and as a result the resident vacates the residential premises, the resident may sue to recover possession of the premises pursuant to R.C. 3733.09(B)(2). Additionally, the resident may recover any actual damages together with reasonable attorney fees.

Fay Gardens Mobile Home Park v. Newman (1983), 14 Ohio App.3d 144, 470 N.E.2d 164, holds that a landlord who successfully brings an action for possession for nonpayment of rent is not liable under R.C. 3733.09(B) to the tenant for retaliatory action.

A violation of R.C. 3733.09(A) may also be asserted by the resident as a defense to an eviction brought by the park operator. See OJI-CV 613.11.

1. The plaintiff (*name resident*) seeks to recover possession of residential premises located at (*describe lot location*) from the defendant (*name park operator*). You shall find for the plaintiff if you find by the greater weight of the evidence that:

(A) The plaintiff is a resident; and

(B) The defendant is the park operator; and

(C) The defendant (increased rent) (decreased services to the resident) (refused or threatened to refuse to renew the rental agreement) (brought or threatened to bring an action for possession of the residential premises) because:

(*Use appropriate alternative[s]*)

(1) The plaintiff complained to (*name appropriate governmental agency*) of a violation of a (building) (housing) (health) (safety) code that is applicable to the premises, and the violation (materially) (significantly) affected health and safety.

COMMENT

The Committee believes a park operator may defeat the claim or defense asserted by the resident pursuant to R.C. 3733.09(A)(1) by proof that the violation complained of was caused by the resident or other person in the resident's household or person on the premises with consent of the resident. See R.C. 3733.091(A)(2).

(*or*)

(2) The plaintiff complained to the defendant that the defendant:

(*Use appropriate alternative[s]*)

COMMENT

One or more of the following alternatives may be asserted by plaintiff; however, he need only prove one in order to prevail.

(a) Failed to comply with ([building] [housing] [health] [safety] code requirements which [materially] [significantly] affects health and safety) (rules of public health council).

(b) Failed to make repairs and do whatever was reasonably necessary to put and keep the premises in a fit and habitable condition.

(c) Failed to keep all common areas of the premises in a safe and sanitary condition.

(d) Failed to maintain in good and safe working order and condition (all [electrical] [plumbing] fixtures and appliances) (septic system) (sanitary and storm sewers) (refuse receptacles) (well and water systems) that were supplied or required to be supplied by the defendant.

(e) Abused his right of (access) (entry) into the residential premises.

COMMENT

See R.C. 3733.10(A)(5) and 3733.101(B).

(f) (Failed to give the plaintiff reasonable notice of his intent to enter the residential premises) (Entered the residential premises at an unreasonable time).

COMMENT

R.C. 3733.10(A)(6) provides twenty-four hours shall be presumed to be a reasonable notice in the absence of evidence to the contrary. See OJI-CV 309.01.

Additionally, the reasonable notice or reasonable entry requirements do not apply in case of an emergency or if impracticable to comply therewith. The Committee believes the park operator would have the burden of proof to establish these conditions in order to avoid compliance with the statutory requirements.

(*or*)

(3) The plaintiff joined with other residents for the purpose of negotiating or dealing collectively with the defendant on any of the terms and conditions of a rental agreement.

(D) The plaintiff (was removed) (vacated) the residential premises as a result of (*describe violation of R.C. 3733.09[A]*); and

(E) The plaintiff delivered a written notice to the defendant (by certified mail, return receipt requested) (by handing a written copy to him) (by leaving it at the defendant's usual place of abode) (by leaving it at the premises from which the defendant is sought to be evicted) on or before (*insert that date which is three days before the filing of the complaint*) advising the defendant of the plaintiff's intention to begin legal proceedings for the recovery of the residential premises.

COMMENT

Drawn from R.C. 1923.04(B). If there is no factual dispute about delivery of this statutory notice, this instruction should not be given. See *Sternberg v. Washington* (1960), 113 Ohio App. 216, 17 O.O.2d 185, 177 N.E.2d 525; *Barr Hotel Co. v. Lloyd MacKeown Buick Co.* (1957), 104 Ohio App. 69, 4 O.O.2d 157, 146 N.E.2d 879.

(F) The defendant remains in possession of the residential premises.

2. ADDITIONAL CLAIM. OJI-CV 613.01 § 2.

COMMENT

R.C. 3733.09(B)(3) provides the resident may recover any actual damages together with reasonable attorney fees. See Comment at OJI-CV 613.03 § 3.

3. MANUFACTURED HOME PARK. R.C. 3733.01(A).

4. RESIDENT. R.C. 3733.01(L).

5. PARK OPERATOR. R.C. 3733.01(N).

6. RESIDENTIAL PREMISES. R.C. 3733.01(O).

7. RENTAL AGREEMENT. R.C. 3733.01(P).

8. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff proved all the elements of his claim, you must find for the plaintiff. On the other hand, your verdict must be for the defendant if you find that the plaintiff failed to prove by the greater weight of the evidence any of the required elements of his claim.

CV 613.11 Affirmative defense to manufactured home park eviction (retaliatory conduct of park operator) R.C. 3733.09

COMMENT

A violation of R.C. 3733.09(A) may be asserted as a defense to an action by a park operator to recover possession of the residential premises. Additionally, the resident may recover any actual damages plus reasonable attorney fees.

If a park operator violates R.C. 3733.09(A) and as a result the resident vacates the residential premises, the resident may sue to recover possession of the premises. See OJI-CV 613.09.

1. The defendant (*name resident*) claims a defense to the action by the plaintiff (*name park operator*) to recover possession of the residential premises. You shall find for the defendant if you find by the greater weight of the evidence that:

(A) The plaintiff (increased rent) (decreased services to the resident) (refused or threatened to refuse to review the rental agreement) (brought or threatened to bring an action for possession of the residential premises) because:

(Use appropriate alternative parts of OJI-CV 613.09 § 1(C))

2. ADDITIONAL CLAIM. OJI-CV 613.01 § 2

COMMENT

R.C. 3733.09(B)(3) provides the resident may recover any actual damages together with reasonable attorney fees. See Comment at OJI-CV 613.03 § 3.

A landlord who successfully brings an action for possession of premises for non-payment of rent is not liable under R.C. 3733.09(B) to the tenant for retaliatory conduct. *Fay Gardens Mobile Home Park v. Newman* (1983), 14 Ohio App.3d 144, 470 N.E.2d 164.

3. MANUFACTURED HOME PARK. R.C. 3733.01(A).

4. RESIDENT. R.C. 3733.01(L).

5. PARK OPERATOR. R.C. 3733.01(N).

6. RESIDENTIAL PREMISES. R.C. 3733.01(O).

7. RENTAL AGREEMENT. R.C. 3733.01(P).

8. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff proved all the elements of his claim and the defendant has failed to prove his defense by the greater weight of the evidence, you must find for plaintiff. On the other hand, your verdict must be for the defendant if you find that the plaintiff failed to prove by

the greater weight of the evidence any of the required elements of his claim or if the defendant proved his defense by the greater weight of the evidence.

CV 613.13 Manufactured home park eviction (non-payment of rent) R.C. 3733.091(A)(1)

COMMENT

The instruction contained in OJI-CV 613.01 may be used in manufactured home park eviction cases for non-payment of rent. The definitions contained in R.C. 3733.01 should be consulted and used where appropriate.

CV 613.15 Resident's claim for damages (violation of obligation of park operator) R.C. 3733.10

1. The plaintiff (*name resident*) seeks to recover damages (and attorney fees) from the defendant (*name park operator*). You shall find for the plaintiff if you find by the greater weight of the evidence that:

(A) The plaintiff is a resident; and

(B) The defendant is the park operator; and

(*Use appropriate alternative[s]*)

COMMENT

One or more of the following alternatives may be asserted by plaintiff; however, he need only prove one in order to prevail.

(C) The defendant failed to comply with the requirements of ([building] [housing] [health] [safety] code which [materially] [significantly] affect health and safety) (rules of the public health council).

(D) The defendant failed to make all repairs and do whatever is reasonably necessary to put and keep the residential premises in a fit and habitable condition.

(E) The defendant failed to keep all common areas of the residential premises in a safe and sanitary condition.

(F) The defendant failed to maintain in good and safe working order and condition (all [electrical] [plumbing] fixtures and appliances) (septic system) (sanitary and storm sewers) (refuse receptacles) (well and water systems) that were supplied or required to be supplied by the park operator.

(G) The defendant abused his right of (access) (entry) into the residential premises.

(H) The defendant (failed to give the resident reasonable notice of his intent to

enter the residential premises) (entered the residential premises at an unreasonable time) (made a lawful entry in an unreasonable manner) (made repeated demands for entry otherwise lawful which demands have the effect of harassing the resident).

2. MANUFACTURED HOME PARK. R.C. 3733.01(A).

3. RESIDENT. R.C. 3733.01(L).

4. PARK OPERATOR. R.C. 3733.01(N).

5. RESIDENTIAL PREMISES. R.C. 3733.01(O).

6. RENTAL AGREEMENT. R.C. 3733.01(P).

7. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff has proved the defendant (*specify act or failure to act complained of*), you must find for the plaintiff. On the other hand, if you find the plaintiff has failed to prove by the greater weight of the evidence the defendant (*specify act or failure to act complained of*), you must find for the defendant.

8. DAMAGES.

COMMENT

R.C. 3733.10(B) permits the resident to recover actual damages and if a judgment is obtained, reasonable attorney fees. It will be necessary to draft jury instructions applicable to the particular injury or damages claimed. See OJI-CV Chapter 315.

The Committee believes that the determination of amount of any attorney fees may, but need not, be submitted to the jury. See Comment at OJI-CV 315.37 (on and after 4-7-05) § 10 Attorney Fees. If the issue is submitted to the jury, see OJI-CV 315.39, Reasonableness of attorney fees.

There is no authority for the award of attorney fees which are punitive in nature where the recovery of "reasonable attorney fees" is authorized. The award must be limited to that which the attorney would have charged the client in the absence of a statutory provision for the recovery of attorney fees. *Fay Gardens Mobile Home Park v. Newman, supra.*

For an instruction on the factors to be considered in determining the reasonableness of attorney fees, see OJI-CV 315.39.

CV 613.17 Manufactured home park operator's claim for damages (violation of statutory obligations of resident) R.C. 3733.10.1

1. The plaintiff (*name park operator*) seeks to recover damages (and attorney fees) from the defendant (*name resident*). You shall find for the plaintiff if you find by the greater weight of the evidence that:

(A) The plaintiff is the park operator; and

(B) The defendant is a resident; and

(*Use appropriate alternative[s]*)

(C) The defendant failed to keep that part of the premises that he occupies and uses safe and sanitary.

(*or*)

(D) The defendant failed to dispose of all (rubbish) (garbage) (other waste) in a clean, safe and sanitary manner.

(*or*)

(E) The defendant failed to comply with (*specify particular health or safety code or rules of public health council or of the manufactured home park.*)

(*or*)

(F) The defendant failed to (personally refrain) (forbid any other person on premises with his permission) from intentionally or negligently (destroying) (defacing) (damaging) (removing) any (fixture) (appliance) (other part of residential premises).

(*or*)

(G) The defendant failed to (conduct himself) (require other persons on the premises with his consent to conduct themselves) in a manner that would not disturb his neighbors peaceful enjoyment of the manufactured home park.

(*or*)

(H) The defendant unreasonably withheld consent for the plaintiff to enter the manufactured home for purpose of (*specify particular purpose set forth in R.C. 3733.101 [B]*).

2. MANUFACTURED HOME PARK. R.C. 3733.01(A).

3. RESIDENT. R.C. 3733.01(L).

4. PARK OPERATOR. R.C. 3733.01(N).

5. RESIDENTIAL PREMISES. R.C. 3733.01(O).

6. RENTAL AGREEMENT. R.C. 3733.01(P).

7. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff has proved the defendant (*specify act or failure to act complained of*), you must find for the plaintiff. On the other hand, if you find the plaintiff has failed to prove by the greater weight of the evidence that the defendant (*specify act or failure to act complained of*), you must find for the defendant.

8. DAMAGES. OJI-CV 613.15 § 8.

CV 613.19 Manufactured home park eviction (termination of term resulting from sale of park) R.C. 3733.11

COMMENT

The limits and restrictions on the ability of a park operator to evict as set forth in *Schwartz v. McAtee* (1986), 22 Ohio St 3d 14, 488 N.E.2d 479, have been modified as a result of legislative amendments to R.C. Chapter 3733. Consistent with the dictum of footnote two of *Schwartz v. McAtee*, *supra*, R.C. 3733.01 now recognizes two types of residents. Subsection (J) defines "tenant" as a person who does not own the manufactured home that occupies the lot he is renting. Subsection (K) defines "owner" as a person who owns the manufactured home that occupies the lot he is renting. The Committee believes that while an "owner" can only be evicted for the reasons in accordance with the provisions contained in R.C. Chapter 3733, a "tenant", in addition to being subject to R.C. Chapter 3733, would also be subject to eviction proceeding provided for in R.C. 5321.17.

The Committee also believes that when a manufactured home park is sold for a use other than as a manufactured home park and the resident fails to leave after proper notice, then depending upon contractual terms, either the manufactured home park operator or his vendee has standing to pursue an eviction action.

1. The plaintiff seeks to recover possession of residential premises located at (*describe lot location*) from the defendant. You shall find for the plaintiff if you find by the greater weight of the evidence that:

(A) Plaintiff is (a park operator) (the buyer of the manufactured home park); and

(B) The defendant occupies the residential premises as (tenant) (owner); and

(C) The manufactured home park was sold for a use other than as a manufactured home park; and

(D) On (*specify date*) the (plaintiff) (former park operator) gave the (tenant) (owner) written notification by (certified mail, return receipt requested) (delivery in person with written acknowledgment of receipt) of the sale of the manufactured home park and that the (tenant) (owner) shall vacate the premises by (*specify date*); and

COMMENT

R.C. 3733.11(A)(3) requires the date by which the resident shall vacate shall be at least 120 days for a tenant and at least 180 days for an owner, after receipt of notification of sale.

(E) The plaintiff delivered a written notice to the defendant (by certified mail, return receipt requested) (by handing a written copy to him) (by leaving it at the defendant's usual place of abode) (by leaving it at the premises from which the defendant is sought to be evicted) on or before (*insert that date which is three days before the filing of the complaint*) advising the defendant of the plaintiff's intention to begin legal proceedings for the removal of the defendant from the premises.

COMMENT

Drawn from R.C. 1923.04(B). If there is no factual dispute about delivery of this statutory notice, this instruction should not be given. See *Sternberg v. Washington* (1960), 113 Ohio App. 216, 17 O.O.2d 185, 177 N.E.2d 525; *Barr Hotel Co. v. Lloyd MacKeown Buick Co.* (1957), 104 Ohio App. 69, 4 O.O.2d 157, 146 N.E.2d 879.

(F) The (tenant) (owner) remains in the residential premises.

2. ADDITIONAL CLAIM. OJI-CV 613.01 § 2.

3. MANUFACTURED HOME PARK. R.C. 3733.01(A).

4. TENANT. R.C. 3733.01(J).

5. OWNER. R.C. 3733.01(K).

6. PARK OPERATOR. R.C. 3733.01(N).

7. RESIDENTIAL PREMISES. R.C. 3733.01(O).

8. RENTAL AGREEMENT. R.C. 3733.01(P).

9. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff proved all the elements of his claim, you must find for plaintiff. On the other hand, your verdict must be for the defendant, if you find that the plaintiff failed to prove by the greater weight of the evidence any of the elements of his claim.

CV 613.21 Manufactured home park eviction (owner holding over term) R.C. 3733.11

COMMENT

See the first paragraph of the introductory Comment at OJI-CV 613.19.

1. The plaintiff seeks to recover possession of residential premises located at (*describe lot location*) from the defendant. You shall find for the plaintiff if you find by the greater weight of the evidence that:

(A) The plaintiff is the park operator; and

(B) The defendant is an owner; and

(C) The plaintiff delivered to defendant (by certified mail, return receipt requested) (in person and secured proof of delivery by receipt) an offer of a written rental agreement for a term (of one year or more) (that was mutually agreed upon) and that contained terms essentially the same as any alternative month to month rental agreement offered to current and prospective residents; and

(D) The defendant did not accept the offer; and

(E) The plaintiff delivered a written notice to the defendant (by certified mail, return receipt requested) (by handing a written copy to him) (by leaving it at the defendant's usual place of abode) (by leaving it at the premises from which the defendant is sought to be evicted) on or before (*insert that date which is three days before the filing of the complaint*) advising the defendant of the plaintiff's intention to begin legal proceedings for the recovery of the residential premises; and

COMMENT

Drawn from R.C. 1923.04(B). If there is no factual dispute about delivery of this statutory notice, this instruction should not be given. See *Sternberg v. Washington* (1960), 113 Ohio App. 216, 17 O.O.2d 185, 177 N.E.2d 525; *Barr Hotel Co. v. Lloyd MacKeown Buick Co.* (1957), 104 Ohio App. 69, 4 O.O.2d 157, 146 N.E.2d 879.

(F) The defendant remains in the residential premises.

2. MANUFACTURED HOME PARK. R.C. 3733.01(A).

3. OWNER. R.C. 3733.01(K).

4. PARK OPERATOR. R.C. 3733.01(N).

5. RESIDENTIAL PREMISES. R.C. 3733.01(O).

6. RENTAL AGREEMENT. R.C. 3733.01(P).

7. ADDITIONAL CLAIMS. OJI-CV 613.01 § 2.

8. AFFIRMATIVE DEFENSES. OJI-CV 613.11.

9. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff proved all the elements of his claim (and the defendant failed to prove his defense by the greater weight of the evidence), you must find for plaintiff. On the other hand, your verdict must be for the defendant if you find that the plaintiff failed to prove by the greater weight of the evidence any of the required elements of his claim (or if the defendant proved his defense by the greater weight of the evidence.)

CV 613.23 Manufactured home park eviction (tenant holding over term) R.C. 5321.17

COMMENT

See the first paragraph of the introductory Comment at OJI-CV 613.19.

1. The plaintiff seeks to recover possession of residential premises located at (*describe lot location*) from the defendant. You shall find for the plaintiff if you find by the greater weight of the evidence that:

(A) The plaintiff is the park operator; and

(B) The defendant is a tenant under a (week to week) (month to month) rental agreement; and

(C) The plaintiff gave the defendant notice (at least seven days) (at least 30 days) prior to the termination date specified in the notice that the rental agreement would (terminate) (not be renewed); and

COMMENT

R.C. 5321.17(A) requires a 7 day notice for a week to week tenancy. R.C. 5321.17(B) requires a 30 day notice for a month to month tenancy. In addition R.C. 5321.17(C) permits the termination of the rental agreement for illegal drug activity as described in R.C. 1923.02(A)(6)(a)(1). The instruction contained in OJI-CV 613.05 may be used in manufactured home park cases for illegal drug evictions; however, the definitions contained in R.C. 3733.01 should be consulted and used where appropriate.

(D) The plaintiff delivered a written notice to the defendant (by certified mail, return receipt requested) (by handing a written copy to him) (by leaving it at the defendant's usual place of abode) (by leaving it at the premises from which the defendant is sought to be evicted) on or before (*insert that date which is three days before the filing of the complaint*) advising the defendant of the plaintiff's intention to begin legal proceedings for the recovery of the residential premises; and

COMMENT

Drawn from R.C. 1923.04(B). If there is no factual dispute about delivery of this statutory notice, this instruction should not be given. See *Sternberg v. Washington* (1960), 113 Ohio App. 216, 17 O.O.2d 185, 177 N.E.2d 525; *Barr Hotel Co. v. Lloyd MacKeown Buick Co.* (1957), 104 Ohio App. 69, 4 O.O.2d 157, 146 N.E.2d 879.

The "three day notice" required by R.C. 1923.04 may not be served on a

tenant until after expiration of the 30 days notice to vacate under R.C. 5321.17(B). *Voyager Village Limited v. Williams* (1982), 3 Ohio App.3d 288, 444 N.E.2d 1337, *Siegler v. Batdorff* (1979), 63 Ohio App.2d 76, 17 O.O.3d 260, 408 N.E.2d 1383, *Ewert v. Basinger* (M.C. 1978), 59 Ohio Misc. 43, 11 O.O.3d 171, 392 N.E.2d 911.

(E) The defendant remains in the residential premises.

2. ADDITIONAL CLAIMS. OJI-CV 613.01 § 2.

3. MANUFACTURED HOME PARK. R.C. 3733.01(A).

4. TENANT. R.C. 3733.01(J).

5. PARK OPERATOR. R.C. 3733.01(N).

6. RESIDENTIAL PREMISES. R.C. 3733.01(O).

7. RENTAL AGREEMENT. R.C. 3733.01(P).

8. AFFIRMATIVE DEFENSES. OJI-CV 613.11.

9. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff proved all the elements of his claim (and the defendant failed to prove his defense by the greater weight of the evidence), you must find for plaintiff. On the other hand, your verdict must be for the defendant if you find that the plaintiff failed to prove by the greater weight of the evidence any of the required elements of his claim (or if the defendant proved his defense by the greater weight of the evidence).

CV 613.25 Resident's claim for damages (prohibited conduct of park operator) R.C. 3733.11(B)

1. The plaintiff (*resident*) (*owner*) (*tenant*) seeks to recover damages (and attorney fees) from the defendant (*park operator*). You shall find for the plaintiff if you find by the greater weight of the evidence that:

(A) The plaintiff is an (owner) (tenant); and

(B) The defendant is the park operator; and

(*Use appropriate alternative[s]*)

COMMENT

One or more of the following alternatives may be asserted by plaintiff; however, he need only prove one in order to prevail.

(C) The defendant failed to fully disclose in writing all (fees) (charges) (assessments) (rental fees) (rules) prior to the plaintiff executing a rental agreement and occupying the residential premises.

COMMENT

R.C. 3733.11(B).

(D) The defendant (increased [fees] [charges] [assessments] [rental fees]) (changed rules) without giving the plaintiff at least 30 days written notice of the (increase) (change).

COMMENT

R.C. 3733.11(B).

(E) The defendant increased (fees) (charges) (assessments) (rental fees) during the term of the plaintiff's rental agreement.

COMMENT

R.C. 3733.11(B).

(F) The defendant required the owner to purchase personal property from the park operator.

COMMENT

R.C. 3733.11(D).

(G) The defendant charged an additional fee to the owner because the owner installed an electric or gas appliance in his manufactured home.

COMMENT

RC. 3733.11(E). An additional fee may be charged if the installation is performed by the park operator at the request of the owner.

(H) The defendant restricted ([installation] [service] [maintenance] [ingress or egress of repairman into or from the manufactured home park for purpose of (installation) (service) (maintenance)] of an electric or gas appliance in the manufactured home) (the making of any interior improvement in a manufactured home).

COMMENT

R.C. 3733.11(E). If an issue is raised whether the installation or improvement is lawful or if adequate utility service were available for the installation or improvement then plaintiff would have the burden of proof on this issue and additional instructions would be necessary.

(I) The defendant required as a condition of entering into a rental agreement that the (tenant lease) (owner purchase) a manufactured home from the (defendant) (other persons).

COMMENT

R.C. 3733.11(F).

(J) The defendant required the owner to use the services of the (defendant) (other person) for the (installation of the manufactured home on the residential premises) (performance of any service).

COMMENT

R.C. 3733.11(G).

(K) The defendant denied the owner the right to sell his manufactured home after the owner gave the defendant ten-day notice of his intent to sell.

(L) The defendant required the owner remove the manufactured home from the manufactured home park solely because of the sale of the manufactured home.

(M) The defendant unreasonably refused to enter into a rental agreement with a purchaser of a manufactured home located within his manufactured home park.

(N) The defendant charged the plaintiff a (fee) (charge) (assessment) that was not set forth in (the written rental agreement) (a written statement given to resident prior to entering into an oral rental agreement).

(O) The defendant charged a (fee) (charge) (assessment) to the owner for the (transfer of ownership) (moving) of a manufactured home that is in excess of the actual costs and expense of the defendant.

COMMENT

Subsection K through O are drawn from R.C. 3733.11(H).

4. MANUFACTURED HOME PARK. R.C. 3733.01(A).

5. MANUFACTURED HOME. R.C. 4501.01 (O).

6. TENANT. R.C. 3733.01(J).

7. OWNER. R.C. 3733.01(K).

8. RESIDENT. R.C. 3733.01(L).

9. PARK OPERATOR. R.C. 3733.01(N).

10. RESIDENTIAL PREMISES. R.C. 3733.01(O).

11. RENTAL AGREEMENT. R.C. 3733.01(P).

12. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff has proved that the defendant (*specify act or failure to act complained of*), you must find for plaintiff. On the other hand, if you find the plaintiff failed to prove by the greater weight of the evidence the defendant (*specify act or failure to act complained of*), you must find for the defendant.

13. DAMAGES.

COMMENT

R.C. 3733.11(I) permits the resident to recover actual damages and if a judgment is obtained reasonable attorney fees. It will be necessary to draft jury instructions applicable to the particular injury or damages claimed. See OJI-CV Chapter 315.

The Committee believes that the determination of amount of any attorney fees may, but need not, be submitted to the jury. See Comment at OJI-CV 315.37 (on and after 4-7-05) § 10 Attorney Fees. If the issue is submitted to the jury, see OJI-CV 315.39, Reasonableness of attorney fees.

For an instruction on the factors to be considered in determining the reasonableness of attorney fees, see OJI-CV 315.39.

CV 613.27 Manufactured home park eviction (first violation of rules of park, health council or health and safety code) R.C. 3733.13

COMMENT

See the first paragraph of the introductory comment at OJI-CV 613.19.

Neither R.C. 1923.02 or R.C. 3733.091 specifically authorizes a forcible entry and detainer action based upon a violation of a state and local health and safety code. If however, a violation of a state and local health and safety code is construed as being a breach of the rental agreement, then R.C. 1923.02(A)(10)

would authorize a forcible entry and detainable action.

1. The plaintiff seeks to recover possession of the residential premises located at (*describe lot location*) from the defendant. You shall find for the plaintiff if you find by the greater weight of the evidence that:

(A) The plaintiff is the park operator; and

(B) The defendant is a resident; and

(C) The defendant violated a (rule of the [manufactured home park] [public health council]) (state and local health and safety code) by (*specify violation*); and

(D) The violation was material; and

(E) On (*specify date*) the plaintiff delivered a written notice to the defendant that the rental agreement will terminate on (*specify date*), unless the defendant repairs, pays damages for, or otherwise (corrects) (remedies) the violation; and

COMMENT

R.C. 3733.13(B) requires at least 30 days notice to the defendant. R.C. 3733.13(C) and (D) sets forth specific information that must be contained in the written notice. Issues concerning the sufficiency of the information contained in the notice are questions of law for the court to determine.

(F) The defendant failed to repair, pay damages for, or otherwise (correct) (remedy) the condition described in the notice before (specify date); and

COMMENT

The Committee believes the resident has the option of selecting the particular remedy set forth in R.C. 3733.13.

A factual dispute may arise relating to whether attempts to correct the violation are adequate. If this occurs, additional instructions governing the particular dispute may be necessary.

(G) The plaintiff delivered a written notice to the defendant (by certified mail, return receipt requested) (by handing a written copy to him) (by leaving it at the defendant's usual place of abode) (by leaving it at the premises from which the defendant is sought to be evicted) on or before (*insert that date which is three days before the filing of the complaint*) advising the defendant of the plaintiff's intention to begin legal proceedings for the removal of the defendant from the premises; and

COMMENT

Drawn from R.C. 1923.04(B). If there is no factual dispute about delivery of this statutory notice, this instruction should not be given. See *Sternberg v. Washington* (1960), 113 Ohio App. 216, 17 O.O.2d 185, 177 N.E.2d 525; *Barr Hotel Co. v. Lloyd MacKeown Buick Co.* (1957), 104 Ohio App. 69, 4 O.O.2d 157, 146 N.E.2d 879.

(H) The resident remains in the residential premises.

2. ADDITIONAL CLAIM. OJI-CV 613.01 § 2.

3. MANUFACTURED HOME PARK. R.C. 3733.01(A).

4. PARK OPERATOR. R.C. 3733.01(N).

5. RESIDENT. R.C. 3733.01(L).

6. RESIDENTIAL PREMISES. R.C. 3733.01(O).

7. RENTAL AGREEMENT. R.C. 3733.01(P).

8. MATERIAL. A material violation is one that is significant or important to the (transaction) (relationship), considering all the facts and circumstances in evidence.

9. DEFENSES. OJI-CV 613.11.

10. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff proved all the elements of his claim (and the defendant failed to prove his defense by the greater weight of the evidence), you must find for plaintiff. On the other hand, your verdict must be for the defendant if you find that the plaintiff failed to prove by the greater weight of the evidence any of the required elements of his claim (or if the defendant proved his defense by the greater weight of the evidence).

CV 613.29 Manufactured home park eviction (second violation of rules of park, health council or health and safety code) R.C. 3733.13

COMMENT

See the first paragraph of the introductory comment at OJI-CV 613.19.

1. The plaintiff seeks to recover possession of the residential premises located at (*describe lot location*) from the defendant. You shall find for the plaintiff if you find by the greater weight of the evidence that:

(A) The plaintiff is the park operator; and

(B) The defendant is a resident; and

(C) The defendant violated a (rule of the [manufactured home park] [public health

council]) (state and local health and safety code) by (*specify violation*); and

(D) The violation was material; and

(E) On (*specify date*), the plaintiff delivered a written notice to the defendant to correct the violation and that if a second material violation of any park or public health council rule, or any health and safety code occurs within six months after the date of this notice, the rental agreement will terminate immediately; and

COMMENT

R.C. 3733.13 sets forth additional specific information the notice must contain. Whether the notice complies with the statute is an issue of law for the court to determine.

(F) Within six months of the date of delivery of the notice of the first violation to the defendant, the defendant violated a (rule of the [manufactured home park] [public health council]) (state and local health and safety code); and

(G) The violation was material; and

(H) The plaintiff delivered a written notice to the defendant (by certified mail, return receipt requested) (by handing a written copy to him) (by leaving it at the defendant's usual place of abode) (by leaving it at the premises from which the defendant is sought to be evicted on or before (*insert that date which is three days before the filing of the complaint*) advising the defendant that this was his second violation and that the plaintiff intends to begin legal proceedings for the removal of the defendant from the premises; and

COMMENT

Drawn from R.C. 1923.04(B). If there is no factual dispute about delivery of this statutory notice, this instruction should not be given. See *Sternberg v. Washington* (1960), 113 Ohio App. 216, 17 O.O.2d 185, 177 N.E.2d 525; *Barr Hotel Co. v. Lloyd MacKeown Buick Co.* (1957), 104 Ohio App. 69, 4 O.O.2d 157, 146 N.E.2d 879.

(I) The resident remains in the residential premises.

2. ADDITIONAL CLAIM. OJI-CV 613.01 § 2.

3. MANUFACTURED HOME PARK. R.C. 3733.01(A).

4. PARK OPERATOR. R.C. 3733.01(N).

5. RESIDENT. R.C. 3733.01(L).

6. RESIDENTIAL PREMISES. R.C. 3733.01(O).

7. RENTAL AGREEMENT. R.C. 3733.01(P).

8. MATERIAL VIOLATION. A material violation is one that is significant or important to the (transaction) (relationship) considering all the facts and circumstances in evidence.

9. DEFENSES.

COMMENT

The two defenses set forth below are contained in R.C. 3733.13(D). The committee believes a third defense, set forth in R.C. 3733.13(D), that the park rule is unreasonable, is a question of law for the court to determine.

For discussion and consideration of other possible defenses, see OJI-CV 613.11.

The defendant claims a defense. You shall find for the defendant if you find the defendant proved by the greater weight of the evidence that:

(*Use appropriate alternative[s]*)

(A) The ([park] or [public health council] rule), (health and local safety code) is not being enforced against other manufactured home park residents.

(B) The two violations were not willful and not committed in bad faith.

10. WILLFUL, IN BAD FAITH. "Willful" means intentional and deliberate. "Committed in bad faith" means that the violations were done dishonestly, for some (hidden) (concealed) ulterior motive (such as self interest), and with an awareness that the act or failure to act was wrong.

11. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff proved all the elements of his claim (and the defendant failed to prove his defense by the greater weight of the evidence), you must find for plaintiff. On the other hand, your verdict must be for the defendant if you find that the plaintiff failed to prove by the greater weight of the evidence any of the required elements of his claim (or if the defendant proved his defense by the greater weight of the evidence).

CV 613.31 Resident's claim for damages (illegal acts of park operator to recover rent or possession of premises) R.C. 3733.17

1. The plaintiff (*name resident*) seeks to recover damages (and attorney fees) from the

defendant (*name park operator*). You shall find for the plaintiff if you find by the greater weight of the evidence that:

(A) The plaintiff is a resident; and

(B) The defendant is a park operator; and

(*Use appropriate alternative[s]*)

(C) The defendant (terminated utilities) (terminated services) (excluded plaintiff from the premises) (threatened an unlawful act [*describe*] against the plaintiff) (other act) for the purpose of recovering possession of the premises.

COMMENT

Acts authorized under Chapters 1923, 3733, and 5303 of the Revised Code to recover possession of the premises are permitted. Whether an act is authorized is a question of law for the court to decide.

(D) The defendant seized the (furnishings) (possessions) of the plaintiff for the purpose of recovering rent payments.

2. RESIDENT. R.C. 3733.01(L).

3. PARK OPERATOR. R.C. 3733.01(N).

4. RESIDENTIAL PREMISES. R.C. 3733.01(O).

5. CONCLUSION. If you find by the greater weight of the evidence that the plaintiff proved all the elements of his claim, you must find for plaintiff. On the other hand, your verdict must be for the defendant if your find that the plaintiff failed to prove by the greater weight of the evidence any of the required elements of his claim.

6. DAMAGES.

COMMENT

R.C. 3733.17 permits the resident to recover all damages together with reasonable attorney fees. It will be necessary to draft jury instructions applicable to the particular injury or damages claimed. See OJI-CV Chapter 315.

The Committee believes that the determination of amount of any attorney fees may, but need not, be submitted to the jury. See Comment at OJI-CV 315.37 (on and after 4-7-05) § 10 Attorney Fees. If the issue is submitted to the jury, see OJI-CV 315.39, Reasonableness of attorney fees.

CV 613.33 Resident's claim for return of security deposit R.C. 3733.18

COMMENT

The instructions contained in OJI-CV 613.07 may be used when the resident seeks return of the security deposit from the park operator. The definitions contained in R.C. 3733.01 should be consulted and used where appropriate.

Chapter CV 617

PREMISES LIABILITY

CV 617.01 **General** *[Rev. 5/6/17]*

CV 617.03 **Invitee; business visitor** *[Rev. 5/6/17]*

CV 617.05 **Social guest** *[Rev. 5/6/17]*

CV 617.07 **Fire/police personnel** *[Rev. 5/6/17]*

CV 617.09 **Licensee** *[Rev. 5/6/17]*

CV 617.11 **Trespasser** *[Rev. 5/6/17]*

CV 617.13 **Attractive nuisance** *[Rev. 5/6/17]*

CV 617.15 **Frequenter** *[Rev. 5/6/17]*

CV 617.17 **Affirmative defense: recreational user** *[Rev. 5/6/17]*

CV 617.19 **Landlord liability (no duty for conditions arising after transfer of possession)** *[Rev. 5/6/17]*

CV 617.21 **Landlord liability (no duty for conditions existing at transfer of possession)** *[Rev. 5/6/17]*

CV 617.23 **Landlord liability (legal duty)** *[Rev. 5/6/17]*

CV 617.25 **Tenant liability** *[Rev. 5/6/17]*

COMMENT

Premises liability sounds primarily in tort and hinges on the relationship of the litigants, i.e., the entrant status of the plaintiff on the premises. See also OJI-CV Chapter 501 Contracts and OJI-CV Chapter 613 Landlords, Tenants for other instructions that may impact entrant status. These instructions attempt to treat each entrant status recognized under Ohio law.

CV 617.01 General *[Rev. 5/6/17]*

1. INTRODUCTION. This is a premises liability case.

2. CLAIMS OF THE PARTIES. The plaintiff claims that the defendant violated a legal duty and caused (injury) (damage) to him/her while the plaintiff was on the defendant's (premises) (property) as a/an (invitee) (business visitor) (social guest) (licensee) (trespasser) (fire fighter/police officer) (frequenter) (recreational user) (tenant) (tenant's [guest] [invitee] [licensee]).

3. STATUS (ADDITIONAL). The status of the person who enters the land of another defines the scope of the legal duty that the defendant(s) owe(s) the entrant. You must decide the duty owed to the plaintiff by the defendant. To decide the duty owed to the plaintiff, you must first decide whether the plaintiff was a/an (invitee) (business visitor) (social guest) (licensee) (trespasser) (fire fighter/police officer) (frequenter) (recreational user) (tenant) (tenant's [guest] [invitee] [licensee]), as the plaintiff claims or

whether the plaintiff was a/an (invitee) (business visitor) (social guest) (licensee) (trespasser) (fire fighter/police officer) (frequenter) (recreational user) (tenant) (tenant's [guest] [invitee] [licensee]) as the defendant claims.

COMMENT

Drawn from *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312 (1996), citing *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414 (1994). The Committee believes that this instruction should only be given in situations where there is a question of fact as to the status of the plaintiff. Because the duty owed by the defendant depends upon the plaintiff's status, the judge may wish to define the status claimed by each party prior to the introduction of the evidence.

Additional instructions may be required if the status of the defendant is in dispute.

CV 617.03 Invitee; business visitor *[Rev. 5/6/17]*

COMMENT

This instruction must be preceded by appropriate preliminary instructions found in OJI-CV 617.01.

1. GENERAL. A/an (invitee) (business visitor) is a person who rightfully (enters) (enters and remains) on the (premises) (property) of another at the express or implied invitation of the (owner) (occupant) and for a purpose beneficial to the (owner) (occupant).

COMMENT

Drawn from *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312 (1996), citing *Scheibel v. Lipton*, 156 Ohio St. 308 (1951).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) he/she was a/an (invitee) (business visitor) on the defendant's (premises) (property); and

(B) the defendant violated the duty he/she/it owed to plaintiff; and

(C) the plaintiff's (injuries) (damages) were proximately caused by the defendant's violation of the duty he/she/it owed to the plaintiff.

3. LIMITATION (ADDITIONAL). The status of a/an (invitee) (business visitor) is

not absolute. It lasts only while the visitor is on the part of the (premises) (property) upon which the (owner) (occupant) gives him/her reason to believe that his/her presence is desired for the purpose for which he/she has entered. If the (invitee) (business visitor) goes outside the (area) (time) of his/her invitation, he/she becomes a licensee or a trespasser.

COMMENT

Drawn from *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312 (1996), and Restatement of the Law 2d, Torts (1965), Section 332, Comment *l*.

This instruction should be given only when there is a question as to whether the plaintiff became a licensee or a trespasser.

4. DUTY. The (owner) (occupant) of the (premises) (property) owes a duty to a/an (invitee) (business visitor) to use ordinary care for the (invitee's) (business visitor's) safety and to keep the (premises) (property) in a reasonably safe condition. The (owner) (occupant) of the (premises) (property) also had a duty to provide notice of any (concealed) (hidden) (latent) dangers about which the (owner) (occupant) of the (premises) (property) knows, or by using ordinary care, should have known.

COMMENT

Drawn from *Light v. Ohio Univ.*, 28 Ohio St.3d 66 (1986); *Anaple v. Standard Oil Co.*, 162 Ohio St. 537 (1955).

5. OPEN AND OBVIOUS. An (owner) (occupant) of property owes no duty to protect (invitees) (business visitors) from open and obvious dangers on the property. The open and obvious nature of the danger itself serves as a warning to the (invitees) (business visitors). (Invitees) (Business visitors) who exercise ordinary care under the circumstances should be able to see and guard against the open and obvious danger.

COMMENT

Drawn from *Armstrong v. Best Buy Co. Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573; *Simmers v. Bentley Contr. Co*, 64 Ohio St.3d 642 (1992). *See also Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961 (2d Dist.); *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677 (1998).

In *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, the court held that, although the open and obvious doctrine can excuse a defendant's breach of a common-law duty of care, it does not override statutory duties because the violation of a statutory duty constitutes negligence per se. In *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, the court held that the open and

obvious doctrine may be asserted as a defense to a claim of liability arising from a violation of the Ohio Basic Building Code because administrative rule violations do not constitute negligence per se.

6. ATTENDANT CIRCUMSTANCES (ADDITIONAL). There may be "attendant circumstances" that (limit) (qualify) the open and obvious nature of the danger. "Attendant circumstances" are factors beyond the control of the plaintiff that contribute to proximately cause the plaintiff's (injury) (damage). The phrase "attendant circumstances" refers to any fact(s) that would (unreasonably) (significantly) limit the plaintiff's ability to see the open and obvious condition.

If you find that "attendant circumstances" are present, then the open and obvious nature of the danger does not eliminate the duty of an (owner) (occupant) to either

(1) exercise ordinary care to keep the (premises) (property) in a reasonably safe condition; or

(2) provide notice of any dangers about which an (owner) (occupant) knows, or by using ordinary care should have known.

COMMENT

Drawn from *Hart v. Dockside Townhomes, Ltd.*, 12th Dist. Butler No. CA2000-11-222 (June 11, 2001), citing *Cash v. City of Cincinnati*, 66 Ohio St.2d 319 (1981); *McGuire v. Sears, Roebuck & Co.*, 118 Ohio App.3d 494 (1st Dist. 1996); *Backus v. Giant Eagle, Inc.*, 115 Ohio App.3d 155 (7th Dist. 1996), distinguished by *Ellington v. JCTH Holdings, Inc.*, 7th Dist. No. , 2015-Ohio-840 which refused to expand the attendant circumstances exception to those situations that are within the control of the pedestrian. For a discussion of "attendant circumstances," see *Stockhauser v. Archdiocese of Cincinnati,* 97 Ohio App.3d 29 (1994).

7. ICE AND SNOW (ADDITIONAL). An (owner) (occupant) of the (premises) (property) has no duty to remove or make less hazardous natural accumulations of ice and snow or to warn (invitees) (business visitors) of the inherent dangers presented by such natural accumulations.

"Natural accumulations" are those that result from an act of nature such as inclement weather conditions of low temperature, strong winds, drifting snow, or the natural melting and freezing of snow into ice. "Unnatural accumulations" are those that are caused or aggravated by the acts of persons rather than the forces of nature.

Before you can find that the plaintiff was (injured) (damaged) as a proximate result of an unnatural accumulation of ice and snow on the defendant's (premises) (property), you must find by the greater weight of the evidence that the accumulation of ice and snow

(1) was created or aggravated by the defendant; and

(2) was known or should have been known to the defendant; and

(3) was substantially more dangerous than it would have been in its natural state.

COMMENT

Drawn from *Brinkman v. Ross*, 68 Ohio St.3d 82 (1993), and *Nemit v. St. Elizabeth Med. Ctr.,* 7th Dist. Mahoning No. 99-CA-202, (June 26, 2001), citing *Porter v. Miller*, 13 Ohio App.3d 93 (6th Dist.1983), and *Kinkey v. Jewish Hosp. Assn. of Cincinnati*, 16 Ohio App.2d 93 (1st Dist. 1968). *See also Cain v. McKee Door Sales*, 10th Dist. Franklin No. 13AP-352, 2013-Ohio-4217.

8. ORDINARY CARE. OJI-CV 401.01.

9. CONCLUSION. OJI-CV Chapter 313.

10. PROXIMATE CAUSE. OJI-CV Chapter 405.

11. DAMAGES. OJI-CV Chapter 315.

CV 617.05 Social guest *[Rev. 5/6/17]*

COMMENT

This instruction must be preceded by appropriate preliminary instructions found in OJI-CV 617.01.

1. GENERAL. A "social guest" is a person who (enters) (enters and remains) on the (premises) (property) of the (owner) (occupant) (host) by express or implied invitation to enjoy hospitality as a guest of the (owner) (occupant) (host). A social guest (enters) (enters and remains) on the (premises) (property) subject to its existing conditions, and assumes the ordinary risks that are present on the (premises) (property).

COMMENT

Drawn from *Scheibel v. Lipton*, 156 Ohio St. 308 (1951), which created a separate category of social guest as distinguished from the licensee and business invitee.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) he/she was a social guest on the defendant's (premises) (property); and

(B) the defendant violated the duty he/she/it owed to the plaintiff; and

(C) the plaintiff's (injuries) (damages) were proximately caused by the defendant's violation of the duty he/she/it owed to the plaintiff.

3. DUTY. A/an (owner) (occupant) (host) has a duty to exercise ordinary care not to cause (injury) (damage) to a social guest by any act or failure to act while a guest is on the (premises) (property). A/an (owner) (occupant) (host) also has a duty to warn a social guest of any known condition that a/an (owner) (occupant) (host), in the exercise of ordinary care, should reasonably consider dangerous if he/she/it has reason to believe that a social guest does not know and would not discover the dangerous condition.

COMMENT

Drawn from *Scheibel v. Lipton*, 156 Ohio St. 308 (1951).

"A host is not an insurer of the safety of a guest and owes a duty only to refrain from acts of negligence and to warn of concealed or hidden dangers, which he has reason to believe the guest would not discover through the use of ordinary care." *Galinari v. Koop*, 12th Dist. Clermont No. CA 2006-10-086, 2007-Ohio-4540, *citing Scheibel*, 156 Ohio St. 308.

4. DUTY—CHILD (ADDITIONAL). A/an (owner) (occupant) (host) owes (an infant) (a child) (youthful persons generally) a greater duty of care than to an adult exposed to the same danger. Children are entitled to a degree of care in proportion to their ability to foresee and avoid the dangers that they may encounter.

COMMENT

Drawn from *DiGildo v. Caponi,* 18 Ohio St.2d 125 (1969).

5. OPEN AND OBVIOUS. A/an (owner) (occupant) (host) of property owes no duty to protect social guests from open and obvious dangers on the property. The open and obvious nature of the danger itself serves as a warning to a social guest. Social guests who exercise ordinary care under the circumstances should be able to see and guard against the open and obvious danger.

COMMENT

Drawn from *Armstrong v. Best Buy Co. Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573; *Simmers v. Bentley Contr. Co*, 64 Ohio St.3d 642 (1992). *See also Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961 (2d Dist.); *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.,* 81 Ohio St.3d 677 (1998).

Jaronovic v. Iacofano, 11th Dist. Lake No. 2011-L-070, 2012-Ohio-1581, holds that a host can assert the open and obvious doctrine as a defense to a negligence

claim asserted against him by the social guest.

6. ATTENDANT CIRCUMSTANCES (ADDITIONAL). There may be "attendant circumstances" that (limit) (qualify) the open and obvious nature of the danger. "Attendant circumstances" are factors beyond the control of the plaintiff that contribute to proximately cause the plaintiff's (injury) (damage). The phrase "attendant circumstances" refers to any fact(s) that would (unreasonably) (significantly) limit the plaintiff's ability to see the open and obvious condition.

If you find that "attendant circumstances" are present, then the open and obvious nature of the danger does not eliminate the duty of an (owner) (occupant) (host) to either

(1) exercise ordinary care to keep the (premises) (property) in a reasonably safe condition; or

(2) provide notice of any dangers an (owner) (occupant) (host) knows, or by using ordinary care should have known.

COMMENT

Drawn from *Hart v. Dockside Townhomes, Ltd.*, 12th Dist. Butler No. CA2000-11-222 (June 11, 2001), citing *Cash v. City of Cincinnati*, 66 Ohio St.2d 319 (1981); *McGuire v. Sears, Roebuck & Co.*, 118 Ohio App.3d 494 (1st Dist. 1996); *Backus v. Giant Eagle, Inc.*, 115 Ohio App.3d 155 (7th Dist. 1996), distinguished by *Ellington v. JCTH Holdings, Inc.*, 7th Dist. No. , 2015-Ohio-840 which refused to expand the attendant circumstances exception to those situations that are within the control of the pedestrian. For a discussion of "attendant circumstances," see *Stockhauser v. Archdiocese of Cincinnati,* 97 Ohio App.3d 29 (1994).

See also Galinari v. Koop, 12th Dist. Clermont No. CA 2006-10-086, 2007-Ohio-4540, *citing Scheibel*, 156 Ohio St. 308.

7. ICE AND SNOW (ADDITIONAL). An (owner) (occupant) (host) of the (premises) (property) has no duty to remove or make less hazardous natural accumulations of ice and snow or to warn social guests of the inherent dangers presented by such natural accumulations.

"Natural accumulations" are those that result from an act of nature such as inclement weather conditions of low temperature, strong winds, drifting snow, and the natural melting and freezing of snow into ice. "Unnatural accumulations" are those that are caused or aggravated by the acts of persons rather than the forces of nature.

Before you can find that the plaintiff was (injured) (damaged) as a proximate result of an unnatural accumulation of ice and snow on the defendant's (premises) (property), you must find by the greater weight of the evidence that the accumulation of ice and snow

(1) was created or aggravated by the defendant; and

(2) was known or should have been known to the defendant; and

(3) was substantially more dangerous than it would have been in its natural state.

COMMENT

Drawn from *Brinkman v. Ross*, 68 Ohio St.3d 82 (1993), and *Nemit v. St. Elizabeth Med. Ctr*, 7th Dist. Mahoning No. 99-CA-202 (June 26, 2001), citing *Porter v. Miller*, 13 Ohio App.3d 93 (6th Dist.1983), and *Kinkey v. Jewish Hosp. Assoc. of Cincinnati*, 16 Ohio App.2d 93 (1st Dist. 1968). *See also Cain v. McKee Door Sales*, 10th Dist. Franklin No. 13AP-352, 2013-Ohio-4217.

8. ORDINARY CARE. OJI-CV 401.01.

9. CONCLUSION. OJI-CV Chapter 313.

10. PROXIMATE CAUSE. OJI-CV Chapter 405.

11. DAMAGES. OJI-CV Chapter 315.

CV 617.07 Fire/police personnel *[Rev. 5/6/17]*

COMMENT

This instruction must be preceded by appropriate preliminary instructions found in OJI-CV 617.01.

1. GENERAL. In a premises liability case, a (fire fighter) (police officer) (*describe other qualified person*) is a person who (enters) (enters and remains) on the (premises) (property) of another, under authority of law even without express or implied invitation, in the performance of his/her official job duties.

COMMENT

Drawn from *Hack v. Gillespie*, 74 Ohio St.3d 362 (1996), and *Scheurer v. Trustees of the Open Bible Church*, 175 Ohio St. 163 (1963).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) he/she was a (fire fighter) (police officer) (*describe other qualified person*) on the defendant's (premises) (property); and

(B) the defendant violated the duty he/she/it owed to the plaintiff; and

the plaintiff's (injuries) (damages) were proximately caused by the defendant's violation of the duty he/she/it owed to the plaintiff.

3. DUTY. The duty owed by the (owner) (occupant) to a (fire fighter) (police officer) (*describe other qualified person*) is not to cause (injury) (damage) to him/her by

(*Use appropriate alternative[s]*)

(A) wanton or willful misconduct;

(*or*)

(B) an affirmative act of negligence;

(*or*)

(C) a hidden trap on the (premises) (property);

(*or*)

(D) a violation of (*describe statute or ordinance enacted for the benefit of fire fighters or police officers or other qualified persons*);

(*or*)

(E) failing to warn, despite an opportunity to warn, of any dangerous condition on the premises known by an (owner) (occupant) that is (hidden) (concealed) and of which a (fire fighter) (police officer) (*describe other qualified person*) has no knowledge, when an (owner) (occupant) knows a (fire fighter) (police officer) (*describe other qualified person*) is or will be on the (premises) (property) and might (meet) (encounter) such danger.

COMMENT

Drawn from *Hack v. Gillespie*, 74 Ohio St.3d 362 (1996), and *Scheurer v. Trustees of the Open Bible Church*, 175 Ohio St. 163 (1963). Distinguished by *Torchik v. Boyce*, 121 Ohio St.3d 440, 2009-Ohio-1248, holding that independent contractors are not protected by the fireman's rule.

A police officer who enters upon privately owned land in the performance of his official duty, and suffers harm due to a condition of a part of the land held open to the public, is an invitee in the same manner as other private citizens lawfully using such land. *See Brady v. Consolidated Rail Corp.*, 35 Ohio St.3d 161 (1988).

See OJI-CV 617.03.

4. WANTON OR WILLFUL MISCONDUCT. OJI-CV 401.41.

5. AFFIRMATIVE ACT OF NEGLIGENCE. An "affirmative act of negligence" is the active doing of a thing which a reasonably (cautious) (careful) (prudent) person would not do under the same or similar circumstances.

COMMENT

Simmons v. Am. Pacific. Ent., L.L.C., 164 Ohio App.3d 763, 2005-Ohio-6957.

6. ORDINARY CARE. OJI-CV 401.01.

7. CONCLUSION. OJI-CV Chapter 313.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. DAMAGES. OJI-CV Chapter 315.

CV 617.09 Licensee *[Rev. 5/6/17]*

1. GENERAL. A "licensee" is a person who (enters) (enters and remains) on the (premises) (property) of another for his/her own pleasure or benefit, and with the (permission) (consent), either express or implied, of the (owner) (occupant), but not by invitation.

COMMENT

Drawn from *Provencher v. Ohio DOT*, 49 Ohio St.3d 265 (1990).

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) he/she was a licensee on the defendant's (premises) (property); and

(B) the defendant violated the duty he/she/it owed to plaintiff; and

(C) the plaintiff's (injuries) (damages) were proximately caused by the defendant's violation of the duty he/she/it owed to the plaintiff.

3. DUTY. An (owner) (occupant) of (premises) (property) owes a duty to a licensee to refrain from reckless conduct, or wanton or willful misconduct, that is likely to (injure) (damage) him/her.

COMMENT

Drawn from *Provencher v. Ohio DOT*, 49 Ohio St.3d 265 (1990). *See also Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312 (1996); *Light v. Ohio Univ.*, 28 Ohio St.3d 66 (1986); *Turner v. Cathedral Ministries*, 6th Dist. Sandusky No. S-14-020, 2015-Ohio-633.

4. DUTY—DISCOVERED PERIL (ADDITIONAL). If the (owner) (occupant) knows, or from facts within his/her/its knowledge should know or believe, that the

licensee is in a position of peril on the (premises) (property), the (owner) (occupant) then has a duty to exercise ordinary care not to cause (injury) (damage) to the licensee.

COMMENT

Drawn from *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312 (1996), citing *Cole v. New York Central RR. Co.*, 150 Ohio St. 175 (1948), and 2 Restatement of the Law 2d, Torts, Section 336, Comment d (1965).

5. RECKLESS CONDUCT, WANTON OR WILLFUL MISCONDUCT. OJI-CV 401.41.

6. COMPARATIVE NEGLIGENCE. OJI-CV Chapter 403.

7. ORDINARY CARE. OJI-CV 401.01.

8. CONCLUSION. OJI-CV Chapter 313.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

CV 617.11 Trespasser *[Rev. 5/6/17]*

1. GENERAL. A "trespasser" is a person who (enters) (enters and remains) on the (premises) (property) of another without (permission) (consent), either express or implied, or invitation for a purpose or convenience of his/her own, or for no apparent purpose.

COMMENT

Drawn from *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312 (1996).

The status of an accidental trespasser is still that of a trespasser. *Id.*

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) he/she was a trespasser on the defendant's (premises) (property); and

(B) the defendant violated the duty he/she/it owed to the plaintiff; and

(C) the plaintiff's (injuries) (damages) were proximately caused by the defendant's violation of the duty he/she/it owed to the plaintiff.

COMMENT

For attractive nuisance, see OJI-CV 617.13.

3. DUTY. An (owner) (occupant) of (premises) (property) owes a duty to a trespasser to refrain from reckless conduct, or wanton or willful misconduct, that is likely to (injure) (damage) him/her.

COMMENT

Drawn from *Provencher v. Ohio DOT*, 49 Ohio St.3d 265 (1990). *See also Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312 (1996); *Light v. Ohio Univ.*, 28 Ohio St.3d 66 (1986); *Turner v. Cathedral Ministries*, 6th Dist. Sandusky No. S-14-020, 2015-Ohio-633.

4. DUTY—DISCOVERED PERIL (ADDITIONAL). If an (owner) (occupant) knows, or from facts within his/her knowledge should know or believe, that a trespasser is in a position of peril on the (premises) (property), a/an (owner) (occupant) then has a duty to exercise ordinary care not to cause (injury) (damage) to the trespasser.

COMMENT

Drawn from *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312 (1996), citing *Cole v. New York Central RR. Co.*, 150 Ohio St. 175 (1948), and 2 Restatement of the Law 2d, Torts, Section 336, Comment d (1965).

5. RECKLESS CONDUCT, WANTON OR WILLFUL MISCONDUCT. OJI-CV 401.41.

6. COMPARATIVE NEGLIGENCE. OJI-CV Chapter 403.

7. ORDINARY CARE. OJI-CV 401.01.

8. CONCLUSION. OJI-CV Chapter 313.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

CV 617.13 Attractive nuisance *[Rev. 5/6/17]*

COMMENT

The attractive nuisance doctrine creates a special duty that is owed by a possessor of land to trespassing children.

1. TRESPASSER. OJI-CV 617.11 § 1.

2. PROOF OF CLAIM FOR TRESPASSER. OJI-CV 617.11 § 2.

3. GENERAL. The attractive nuisance doctrine creates a special duty that is owed by a possessor of land to trespassing children. An attractive nuisance is an artificial condition that is inherently dangerous or presents a foreseeable, unreasonable risk of death or serious bodily harm to children. A hazard that is inherently dangerous requires special precautions at all times to avoid injury.

COMMENT

Drawn from *Bennett v. Stanley*, 92 Ohio St.3d 35 (2001); *McDaniels v. Sovereign Homes*, 10th Dist. Franklin No. 06AP-399, 2006-Ohio-6149.

4. DUTY. The possessor of land owes a duty to trespassing children to exercise (reasonable) (ordinary) care to eliminate the (danger) (condition) or otherwise protect the children from physical harm caused by an artificial condition upon land if

(A) the place where the (danger) (condition) exists is one upon which the possessor knows or has reason to know that children are likely to trespass; and

(B) the (danger) (condition) is one which the possessor knows or should realize will involve an unreasonable risk of death or serious bodily harm to such children; and

(C) the children because of their youth do not discover the (danger) (condition) or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it; and

(D) the (utility) (value) to the possessor of maintaining the (danger) (condition) and the burden of eliminating the danger are slight as compared with the risk to children involved.

COMMENT

Drawn from 2 Restatement of the Law 2d, Torts, Section 339 (1965).

The doctrine of attractive nuisance as set forth in 2 Restatement of the Law 2d, Torts, Section 339 (1965), was judicially adopted June 13, 2001, in *Bennett v. Stanley*, 92 Ohio St.3d 35 (2001). A moving train does not fall under the category of an attractive nuisance because it is not a hidden danger and its potential for harm is readily apparent, even to young children. *Sutton v. Wheeling & Lake Erie RR Co.*, 9th Dist. Summit No. 22642, 2005-Ohio-6912.

5. A POSSESSOR OF LAND. "A possessor of land" is a person who

(*Use appropriate alternative[s]*)

(A) occupies the land with the intent to control it;

(*or*)

(B) has occupied the land with the intent to control it, if no other person has subsequently occupied it with the intent to control it;

(*or*)

(C) is entitled to immediately occupy the land, if no other person occupies the land with the intent to control it.

COMMENT

Drawn from 2 Restatement of the Law 2d, Torts, Section 328(E) (1965).

For situations when a non-occupying owner is a party defendant, see OJI-CV 617.19, OJI-CV 617.21, and OJI-CV 617.23.

6. CHILDREN. "Children" mean persons under the age of eighteen.

7. ARTIFICIAL CONDITION. "Artificial condition" means structures or other artificial, as opposed to natural, conditions upon the land. It is not necessary that the artificial condition(s) has/have been created by the possessor or that he/she/it did anything active to maintain it/them.

COMMENT

Drawn from 2 Restatement of the Law 2d, Torts, Section 339, Comment d (1965).

8. HAS REASON TO KNOW. "Has reason to know" means that the possessor has information from which a person of reasonable intelligence would (infer) (conclude) or would act on the assumption that

(*Use appropriate alternative[s]*)

(A) children are likely to trespass on the land;

(*or*)

(B) a particular condition exists;

(*or*)

(C) a particular condition is likely to be dangerous to trespassing children.

COMMENT

Drawn from 2 Restatement of the Law 2d, Torts, Section 339, Comments g and

h (1965).

9. ARTIFICIAL CONDITIONS—EXTENT OF DUTY. A possessor of land is not required to keep his/her/its land free from artificial conditions, or to protect children who discover or should discover the conditions, and appreciate or should appreciate the full risk involved but choose to encounter them out of recklessness or a sense of adventure.

COMMENT

Drawn from 2 Restatement of the Law 2d, Torts, Section 339, Comments i and m (1965).

If the artificial condition is open and obvious and the danger can be reasonably appreciated by children, there is no duty owed by the possessor of land. *Lisko v. Sharon Slag, Inc.*, 7th Dist. Mahoning No. 08 MA 170, 2009-Ohio-6535.

10. BALANCING RISK AND UTILITY. A particular condition does not involve unreasonable risk to trespassing children unless it involves a grave risk to them which could be eliminated without a serious interference with the possessor's legitimate use of the land.

COMMENT

Drawn from 2 Restatement of the Law 2d, Torts, Section 339, Comment n (1965).

11. ATTRACTIVE NUISANCE—RESCUER (ADDITIONAL). If you find from the greater weight of the evidence that (*insert name of child*) was a trespasser to whom the defendant (was) (would have been) liable for (injury) (damage) and that (*insert name of alleged rescuer*) entered the possessor's property to rescue (*insert name of child*), then the defendant is also liable for (injury) (damage) to (*insert name of alleged rescuer*) if (*insert name of alleged rescuer*) did not rashly and unnecessarily expose himself/herself to danger during the attempted rescue.

COMMENT

Drawn from *Bennett v. Stanley*, 92 Ohio St.3d 35 (2001).

12. NEGLIGENCE AND ORDINARY CARE. OJI-CV 401.01.

13. COMPARATIVE NEGLIGENCE. OJI-CV Chapter 403.

14. CONCLUSION. OJI-CV Chapter 313.

15. PROXIMATE CAUSE. OJI-CV Chapter 405.

16. DAMAGES. OJI-CV Chapter 315.

CV 617.15 Frequenter *[Rev. 5/6/17]*

1. GENERAL. A "frequenter" is a person, other than an employee or trespasser, who enters a place of employment.

COMMENT

Drawn from R.C 4121.01.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) he/she was a frequenter on the defendant's (premises) (property); and

(B) the defendant violated the duty he/she/it owed to the plaintiff; and

(C) the plaintiff's (injuries) (damages) were proximately caused by the defendant's violation of the duty he/she/it owed to the plaintiff.

3. DUTY—GENERALLY. The (owner) (occupant) of the (premises) (property) owes a duty to a frequenter to use ordinary care for the frequenter's safety, to keep the (premises) (property) in a reasonably safe condition, and to use ordinary care to provide notice of any concealed dangers of which the (owner) (occupant) of the (premises) (property) has knowledge, or which by using ordinary care should have discovered.

COMMENT

The duty owed a frequenter generally is the same as that owed a business invitee. *See Westwood v. Thrifty Boy*, 29 Ohio St.2d 84 (1972).

4. NO DUTY—INDEPENDENT CONTRACTORS. An (owner) (occupant) of (premises) (property) does not owe a duty of protection to frequenters engaged in inherently dangerous work who are (independent contractors) (employees of independent contractors) unless the (owner) (occupant) actively participates in the independent contractor's work.

COMMENT

Drawn from *Wellman v. Edison Ohio Gas Co.*, 160 Ohio St. 103 (1953).

R.C. 4101.11 creates a duty on employers to care for employees and frequenters

(including employees of others). However, that duty does not extend to employees of independent contractors for hazards which are inherently and necessarily present because of the nature of work performed. *See Eicher v. United States Steel Corp.*, 32 Ohio St.3d 248 (1987).

5. INDEPENDENT CONTRACTOR. OJI-CV 423.09.

COMMENT

"The chief test in determining whether one is an employee or an independent contractor is the right to control the manner or means of performing the work." *Bobik v. Indus. Comm.*, 146 Ohio St. 187 (1946), paragraph 1 of the syllabus. Approved in *Pusey v. Bator*, 94 Ohio St.3d 275, 2002-Ohio-795. *See also* OJI-CV 423.09 § 5.

6. INHERENTLY DANGEROUS WORK. "Inherently dangerous work" means work which involves elements of real or potential danger. In deciding whether there are inherent dangers involved, you must consider all the circumstances in evidence surrounding the work activities as well as the work itself.

COMMENT

Drawn from *Wellman v. Edison Ohio Gas Co.*, 160 Ohio St. 103 (1953), and *Frost v. Dayton Power & Light Co.*, 138 Ohio App.3d 182 (4th Dist. 2000).

7. ACTIVE PARTICIPATION. "Active participation" means more than supervising or coordinating. The (owner) (occupant) "actively participates" in the work of the independent contractor when

(1) he/she/it directs or exercises control over the work activities of the independent contractor's employees; or

(2) he/she/it retains or exercises control over a critical variable in the work area.

An (owner) (occupant), however, does not "actively participate" when he/she/it merely exercises a general supervisory role over the project.

COMMENT

Schlueter v. Rohn & Haas Chems, LLC, S.D.Ohio No. 1:12-cv-88 (Oct. 9, 2013), citing *Sopkovich v. Ohio Edison Co.*, 81 Ohio St.3d 628 (1998), and *Cafferkey v. Turner Constr. Co.*, 21 Ohio St.3d 110 (1986). *See also Bond v. Howard Corporation*, 72 Ohio St.3d 332 (1995).

8. DUTY—ACTIVE PARTICIPATION. An (owner) (occupant) who engages the services of an independent contractor, and who actively participates in the job operation performed by such contractor, owes the frequenter (who is an [independent contractor] [employee of an independent contractor]) a duty to exercise ordinary care to eliminate any hazard that the (owner) (occupant) could have eliminated through exercise of ordinary care.

The existence of hazards which could be eliminated by the exercise of ordinary care of an (owner) (occupant) cannot be considered as inherent hazards necessarily present because of the character of the work to be done.

COMMENT

Drawn from *Hirschbach v. Cincinnati Gas & Elec.*, 6 Ohio St.3d 206 (1983).

9. OPEN AND OBVIOUS (ADDITIONAL). An (owner) (occupant) of property owes no duty to protect frequenters from open and obvious dangers on the (premises) (property). The open and obvious nature of the danger itself serves as a warning to the frequenter. Frequenters who exercise ordinary care under the circumstances should be able to see and guard against the open and obvious danger.

COMMENT

Drawn from *Armstrong v. Best Buy Co. Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573; *Simmers v. Bentley Contr. Co.*, 64 Ohio St.3d 642 (1992). *See also Hissong v. Miller*, 186 Ohio App.3d 345, 2010-Ohio-961 (2d Dist.); *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677 (1998); *Holcombe v. Holcombe*, 12 Dist. Clermont No. CA2013-10-080, 2014-Ohio-3081.

In *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, the court held that, although the open and obvious doctrine can excuse a defendant's breach of a common-law duty of care, it does not override statutory duties because the violation of a statutory duty constitutes negligence per se. In *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, the court held that the open and obvious doctrine may be asserted as a defense to a claim of liability arising from a violation of the Ohio Basic Building Code because administrative rule violations do not constitute negligence per se.

10. ATTENDANT CIRCUMSTANCES (ADDITIONAL). OJI-CV 617.03 § 6.

11. ICE AND SNOW—NATURAL ACCUMULATIONS (ADDITIONAL). OJI-CV 617.03 § 7.

12. ORDINARY CARE. OJI-CV 401.01.

13. COMPARATIVE NEGLIGENCE. OJI-CV Chapter 403.

14. CONCLUSION. OJI-CV Chapter 313.

15. PROXIMATE CAUSE. OJI-CV Chapter 405.

16. DAMAGES. OJI-CV Chapter 315.

CV 617.17 Affirmative defense: recreational user *[Rev. 5/6/17]*

1. GENERAL. OJI-CV 303.03.

2. RECREATIONAL USER. The defendant claims that he/she/it owes no duty to the plaintiff because the plaintiff was a recreational user and the plaintiff's (injury) (damage) took place on the defendant's premises. If you find by the greater weight of the evidence that the plaintiff was a recreational user, you must find for the defendant.

COMMENT

Drawn from *Combs v. Ohio Dept. of Natural Resources*, 146 Ohio St.3d 271, 2016-Ohio-1565; *Miller v. Dayton*, 42 Ohio St.3d 113 (1989).

R.C. 1533.181 provides immunity for owners, lessees, and occupants of premises if the plaintiff is a "recreational user."

"Where individuals engage in recreational or sports activities, they assume the ordinary risk of the activity and may not recover for any injury unless it can be shown that the other participant's actions were either 'reckless' or 'intentional' as defined in sections 500 and 8A of the Restatement of Torts 2d." *Marchetti v. Kalish*, 53 Ohio St.3d 95 (1990). *See also* OJI-CV 403.09.

3. RECREATIONAL USER DEFINED. "Recreational user" means a person to whom permission has been granted

(*Use appropriate alternative[s]*)

(A) without the payment of a (fee) (*describe other consideration*) to the (owner) (lessee) (occupant) of premises to enter upon the premises to (hunt) (fish) (trap) (camp) (hike) (swim) (operate a [snowmobile][all purpose vehicle] [four-wheel drive motor vehicle]) (engage in other recreational pursuits);

(*or*)

(B) with the payment of a (fee) (*describe other consideration*) to (the state or any agency of the state) (the owner of privately owned lands) to enter upon the premises to (hunt) (fish) (trap) (camp) (hike) (swim) (engage in other recreational pursuits) (operate a [snowmobile] [all purpose vehicle] [four-wheel drive motor vehicle]) (engage in other recreational pursuits).

In deciding whether the plaintiff was a recreational user, you must consider the character of the property upon which the (injury) (damage) occurred and the type of activity for which the property was held open to the public.

COMMENT

Drawn from R.C. 1533.18(B).

Drawn from *Miller v. Dayton*, 42 Ohio St.3d 113 (1989).

4. PREMISES. "Premises" means all privately-owned lands, ways, waters, and any buildings and structures thereon, and all privately owned and state-owned lands, ways, and waters leased to a private person, firm, organization, or corporation, including any buildings and structures thereon.

COMMENT

Drawn from R.C. 1533.18(A).

The state and other political subdivisions enjoy immunity derived from that enjoyed by private persons under R.C. 1533.181. *See Johnson v. New London*, 36 Ohio St.3d 60 (1988).

5. RECREATIONAL PURSUITS. "Recreational pursuits" are activities engaged in for the pleasure of the actor, such as snowmobiling, sledding, horseback riding, watching others swim, motorcycle riding, swinging, merry-go-round rides, watching baseball, and softball.

COMMENT

Drawn from *Miller v. Dayton*, 42 Ohio St.3d 113 (1989).

6. CONCLUSION WITH AFFIRMATIVE DEFENSE. If you find by the greater weight of the evidence that the plaintiff was a recreational user on the defendant's premises, your verdict must be for the defendant.

CV 617.19 Landlord liability (no duty for conditions arising after transfer of possession) *[Rev. 5/6/17]*

COMMENT

A landlord owes the same duties to persons lawfully upon the leased premises, including guests, invitees, and licensees of the tenant, as the landlord owes the tenant. *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414 (1994).

A landlord who employs an independent contractor to perform a duty which the landlord owes to his tenant to maintain the leased property in reasonably safe condition is subject to liability to the tenant, and to third persons upon the leased property with the consent of the tenant, for physical harm caused by the

contractor's failure to exercise reasonable care to make the leased property reasonably safe. 2 Restatement of the Law 2d, Property, Section 19.1 (1977), approved in *Shump,* 71 Ohio St.3d 414.

A landlord has statutory responsibility in residential premises cases pursuant to R.C. 5321.04(A). See OJI-CV 617.19 § 2.

The common law classifications of trespasser, licensee, and invitee determine the legal duty that a tenant owes others who enter upon rental property that is in the exclusive possession of the tenant. *Shump*, 71 Ohio St.3d 414.

1. GENERAL. A landlord has no duty to a/an (tenant) ([social guest] [invitee] [licensee] of the tenant) for physical harm caused by any dangerous condition that comes into existence after the tenant has taken possession except

(*Use appropriate alternative[s]*)

(A) a landlord has a duty to a/an (tenant) ([social guest] [invitee] [licensee] of the tenant) to exercise (reasonable) (ordinary) care to perform a (contract) (agreement) to repair a condition that creates an unreasonable risk to persons upon the (premises) (property);

(*or*)

(B) when a landlord leases part of the (premises) (property) to a tenant and retains control of another part that the (tenant) ([social guest] [invitee] [licensee] of the tenant) is entitled to use, the landlord has a duty to the (tenant) ([social guest] [invitee] [licensee] of the tenant) to exercise (reasonable) (ordinary) care to discover and make safe any dangerous condition that involves an unreasonable risk to persons upon the (premises) (property) over which the landlord retains control;

(*or*)

(C) when a landlord leases part of the (premises) (property) to a tenant and retains control of another part that is necessary to the safe use of the leased part, the landlord has a duty to the (tenant) ([social guest] [invitee] [licensee] of the tenant) to exercise (reasonable) (ordinary) care to discover and make safe any dangerous condition upon the (premises) (property) over which the landlord retains control that involves an unreasonable risk to persons upon the part leased to the tenant;

(*or*)

(D) when making repairs to (premises) (property) leased to a tenant, the landlord has a duty to the (tenant) ([social guest] [invitee] [licensee] of the tenant) to exercise (reasonable) (ordinary) care, not to make the (premises) (property) more dangerous for use, or give it a deceptive appearance of safety the nature of which the (tenant) ([social guest] [invitee] [licensee] of the tenant) neither knows nor should know.

COMMENT

Drawn from 2 Restatement of the Law 2d, Torts, Sections 257, 355, 360, 361,

362 (1965), approved and adopted in *Shump,* 71 Ohio St.3d 414.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) he/she was a/an (tenant) ([guest] [invitee][licensee] of the tenant); and

(B) his/her (injuries) (damages) were proximately caused by the defendant's violation of a duty owed to the plaintiff by the defendant.

3. OPEN AND OBVIOUS. OJI-CV 617.03 § 5.

4. ATTENDANT CIRCUMSTANCES. OJI-CV 617.03 § 6.

5. ICE AND SNOW (ADDITIONAL). OJI-CV 617.03 § 7.

6. ORDINARY CARE. OJI-CV 401.01.

7. CONCLUSION. OJI-CV Chapter 313.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. DAMAGES. OJI-CV Chapter 315.

CV 617.21 Landlord liability (no duty for conditions existing at transfer of possession) *[Rev. 5/6/17]*

COMMENT

A landlord owes the same duties to persons lawfully upon the leased premises, including guests, invitees, and licensees of the tenant, as the landlord owes the tenant. *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414 (1994).

A landlord who employs an independent contractor to perform a duty which the landlord owes to his tenant to maintain the leased property in reasonably safe condition is subject to liability to the tenant, and to third persons upon the leased property with the consent of the tenant, for physical harm caused by the contractor's failure to exercise reasonable care to make the leased property reasonably safe. 2 Restatement of the Law 2d, Property, Section 19.1 (1977), approved in *Shump,* 71 Ohio St.3d 414.

A landlord has statutory responsibility in residential premises cases pursuant to R.C. 5321.04(A). *See* OJI-CV 617.19 § 2.

The common law classifications of trespasser, licensee, and invitee determine the legal duty that a tenant owes others who enter upon rental property that is in the exclusive possession of the tenant. *Shump,* 71 Ohio St.3d 414.

1. GENERAL. A landlord has no duty to a/an (tenant) ([social guest] [invitee] [licensee] of the tenant) for physical harm caused by any dangerous condition, whether natural or artificial, that existed when the tenant took possession except

(*Use appropriate alternative[s]*)

(A) a landlord has a duty to a/an (tenant) ([social guest] [invitee] [licensee] of the tenant) to exercise (reasonable) (ordinary) care to perform a (contract) (agreement) to repair a condition that creates an unreasonable risk to persons upon the (premises) (property);

(*or*)

(B) a landlord has a duty to a/an (tenant) ([social guest] [invitee] [licensee] of the tenant) to (not actively conceal from) (disclose to) the tenant any condition, whether natural or artificial, that involves an unreasonable risk of physical harm to persons on the (premises) (property) if

(1) the tenant does not know or have reason to know of the condition or risk involved; and

(2) the landlord knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the tenant will not discover the condition or realize the risk.

If the landlord (actively) (deliberately) conceals the condition, the duty (not to conceal from) (to disclose to) a/an (tenant) ([social guest] [invitee] [licensee] of the tenant) continues until the tenant discovers it and has reasonable opportunity to take effective precautions against it. If the landlord does not (actively) (deliberately) conceal the condition, the duty to disclose only continues until the tenant has had reasonable opportunity to discover the condition and to take effective precautions;

(*or*)

(C) a landlord who leases land for a purpose that involves the admission of the public has a duty to exercise (reasonable) (ordinary) care to discover and make safe any condition that involves an unreasonable risk of physical harm to persons on the land for such purpose when the landlord

(1) knows or by the exercise of reasonable care could discover that the condition involves an unreasonable risk of harm to such persons; and

(2) has reason to expect that the tenant will admit the public before the land is put in safe condition for the public;

(*or*)

(D) when the landlord leases part of the (premises) (property) to a tenant and retains control of another part that the (tenant) ([social guest] [invitee] [licensee] of the tenant) is entitled to use, the landlord has a duty to the (tenant) ([social guest] [invitee] [licensee] of the tenant) to exercise (reasonable) (ordinary) care to discover and make safe any dangerous condition that involves an unreasonable risk to persons upon the (premises) (property) over which the landlord retains control;

(*or*)

(E) when a landlord leases part of the (premises) (property) to a tenant and retains control of another part that you decide is necessary to the safe use of the leased part, the landlord has a duty to the (tenant) ([social guest] [invitee] [licensee] of the tenant) to exercise (reasonable) (ordinary) care to discover and make safe any dangerous condition upon that part of the (premises) (property) over which the landlord retains control that involves an unreasonable risk to persons on the part leased to the tenant;

(*or*)

(F) when making repairs to (premises) (property) leased to a tenant, a landlord has a duty to the (tenant) ([social guest] [invitee] [licensee] of the tenant) to exercise (reasonable) (ordinary) care to avoid making the (premises) (property) more dangerous for use or give it a deceptive appearance of safety the nature of which the (tenant) ([social guest] [invitee] [licensee] of the tenant) neither knows nor should know.

COMMENT

Drawn from 2 Restatement of the Law 2d, Torts, Sections 257, 355, 360, 361, 362 (1965), approved and adopted in *Shump*, 71 Ohio St.3d 414.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) he/she was a/an (tenant) ([guest] [invitee][licensee] of the tenant); and

(B) his/her (injuries) (damages) were proximately caused by the defendant's violation of a duty owed to the plaintiff by the defendant.

3. OPEN AND OBVIOUS. OJI-CV 617.03 § 5.

4. ATTENDANT CIRCUMSTANCES. OJI-CV 617.03 § 6.

5. ICE AND SNOW (ADDITIONAL). OJI-CV 617.03 § 7.

6. ORDINARY CARE. OJI-CV 401.01.

7. CONCLUSION. OJI-CV Chapter 313.

8. PROXIMATE CAUSE. OJI-CV Chapter 405.

9. DAMAGES. OJI-CV Chapter 315.

CV 617.23 Landlord liability (legal duty) ***[Rev. 5/6/17]***

COMMENT

A landlord owes to a tenant's guest the same duty that the landlord owes a tenant. Thus, a landlord owes a tenant, and therefore the tenant's guest, the duty to keep all common areas of the premises in a safe and sanitary condition pursuant

to R.C. 5321.04(A)(3). A violation of the duty imposed by R.C. 5321.04(A)(3) constitutes negligence per se and obviates the open-and-obvious-danger doctrine. *Mann v. Northgate Investors, L.L.C.*, 138 Ohio St.3d 175, 2014-Ohio-455.

A landlord who employs an independent contractor to perform a duty that the landlord owes to his/her tenant to maintain the leased property in reasonably safe condition is subject to liability to the tenant, and to third persons upon the leased property with the consent of the tenant, for physical harm caused by the contractor's failure to exercise reasonable care to make the leased property reasonably safe. *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 1994-Ohio-427.

A landlord has statutory responsibility in residential premises cases pursuant to R.C. 5321.04(A). *See* OJI-CV 617.23 § 2.

The common law classifications of trespasser, licensee, and invitee determine the legal duty that a tenant owes others who enter upon rental property that is in the exclusive possession of the tenant. *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 1994-Ohio-427.

1. GENERAL. A landlord has a duty to a/an (tenant) ([social guest] [invitee] [licensee] of the tenant) for physical harm caused by any dangerous condition that comes into existence before or after the tenant has taken possession to exercise (reasonable) (ordinary) care to repair the condition if the existence of the condition is in violation of (*insert language of applicable statute, ordinance, or administrative regulation*).

COMMENT

Drawn from 2 Restatement of the Law 2d, Property, Section 17.6 (1977), approved in *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 1994-Ohio-427. The section also includes reference to an implied warranty of habitability in regard to residential property. The Committee believes that any such warranty is subsumed in R.C. 5321.04. For instructions, see OJI-CV 617.23 § 2.

2. RESIDENTIAL PROPERTY. R.C. Chapter 5321.

COMMENT

Provisions of this § 2(A)(1) through (A)(8) are drawn from R.C. 5321.04(A).

(A) DUTY. A landlord (of residential [property] [premises]) who is a party to a rental agreement has a duty

(Use appropriate alternative[s])

(A)(1) to comply with the requirements of (*specify all relevant building, housing,*

health, and safety codes that materially affect health and safety);

(*or*)

(A)(2) to make all repairs and to do whatever is reasonably necessary to put and keep the (premises) (property) in a fit and habitable condition;

(*or*)

(A)(3) to keep all common areas of the (premises) (property) in a safe and sanitary condition;

(*or*)

(A)(4) to maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by the landlord;

(*or*)

(A)(5) when the landlord is a party to any rental agreements that cover four or more dwelling units in the same structure, to provide and maintain appropriate receptacles for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of a dwelling unit, and to arrange for their removal;

(*or*)

(A)(6) to supply running water, reasonable amounts of hot water, and reasonable heat, at all times, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection;

(*or*)

(A)(7) not to abuse (*specify any right of access conferred by R.C. 5321.05[B]*);

(*or*)

(A)(8) except in the case of emergency or if it is impracticable to do so, to give the tenant reasonable notice of the landlord's intent to enter and to enter only at reasonable times. Twenty-four hours is presumed to be a reasonable notice in the absence of evidence to the contrary.

(B) VIOLATION. An act or failure to act in accordance with any of (this duty) (any of these duties) is negligence as a matter of law.

COMMENT

A landlord's failure to fulfill the duties imposed by R.C. 5321.04 renders the landlord liable for injuries on the demised premises caused thereby. *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20 (1981). The violation is negligence per se.

A landlord employing an independent contractor to make repairs to the leased

property is liable to tenants, and others on the property with tenants' consent, for harm caused by the contractor's negligence as though the contractor's conduct were that of the landlord. *Strayer v. Lindeman*, 68 Ohio St.2d 32 (1981). *See* OJI-CV 423.13 § 2.

(C) NOTICE. Before you can find the landlord liable for a (defective) (dangerous) condition on the rented property, you must find by the greater weight of the evidence that

(C)(1) the landlord received notice of the condition, the landlord knew of the condition, or that the tenant had made reasonable, but unsuccessful, attempts to notify the landlord; and

(C)(2) the landlord failed to remove or correct the condition within a reasonable time.

COMMENT

Drawn from R.C. 5321.07.

(D) TENANT. "Tenant" means a person entitled under a rental agreement to the use and occupancy of residential premises to the exclusion of others.

COMMENT

R.C. 5321.01.

(E) LANDLORD. R.C. 5321.01.

(F) RESIDENTIAL PREMISES. R.C. 5321.01.

(G) RENTAL AGREEMENT. "Rental agreement" means any agreement or lease, written or oral, which establishes or modifies the terms, conditions, rules, or any other provisions concerning the use and occupancy of residential premises by one of the parties.

COMMENT

R.C. 5321.01.

(H) DWELLING UNIT. "Dwelling unit" means a structure or the part of a structure that is used as a home, residence, or sleeping place by one person who

maintains a household or by two or more persons who maintain a common household.

COMMENT

R.C. 5321.01.

3. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that

(A) he/she was a/an (tenant) ([guest] [invitee] [licensee] of the tenant); and

(B) his/her (injuries) (damages) were proximately caused by the defendant's violation of a duty owed to the plaintiff by the defendant.

4. OPEN AND OBVIOUS. OJI-CV 617.03 § 5.

COMMENT

The "open and obvious" doctrine does not dissolve the statutory duty to repair. If the jury finds that the landlord breached the statutory duty to repair, the "open and obvious" doctrine will not protect the landlord from liability. If the jury finds no statutory breach, however, it must determine whether the danger was open and obvious under common law negligence principles.

Drawn from *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362.

5. ATTENDANT CIRCUMSTANCES. OJI-CV 617.03 § 6.

6. ICE AND SNOW (ADDITIONAL). OJI-CV 617.03 § 7.

7. ORDINARY CARE. OJI-CV 401.01.

8. CONCLUSION. OJI-CV Chapter 313.

9. PROXIMATE CAUSE. OJI-CV Chapter 405.

10. DAMAGES. OJI-CV Chapter 315.

CV 617.25 Tenant liability *[Rev. 5/6/17]*

COMMENT

The common law classifications of trespasser, licensee, and invitee determine the legal duty that a tenant owes others who enter upon rental property that is in the exclusive possession of the tenant. *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 1994-Ohio-427. *See* instructions at OJI-CV 617.01, et

seq.

(Text continued on page 725)

Chapter CV 621

NUISANCE

CV 621.01 **Absolute nuisance–statutory violation** *[Rev. 3-18-02]*

CV 621.03 **Absolute nuisance–abnormally dangerous activity** *[Rev. 3-18-02]*

CV 621.05 **Absolute nuisance–intentional acts** *[Rev. 3-18-02]*

CV 621.07 **Qualified nuisance** *[Rev. 3-18-02]*

CV 621.09 **Regulated activity** *[Rev. 3-18-02]*

CV 621.11 **Coming to the nuisance** *[Rev. 3-18-02]*

CV 621.13 **Compensatory damages** *[Rev. 1-22-11]*

COMMENT

Ohio law classifies nuisance into different categories. While the law in Ohio is far from clear, the general categories are public nuisances or private nuisances which are further categorized as absolute nuisances or qualified nuisances.

A public nuisance includes the invasion of public rights, which are rights common to all members of the public. Historically, governmental agencies pursue public nuisances which result in the issuance of injunctions and possible fines and are therefore not jury questions. On the other hand, a private nuisance covers the invasion of the private interest in the use and enjoyment of land. As such, these actions are brought by private individuals and are founded upon the private interests in land.

Case law also characterizes nuisances more specifically. Absolute nuisance is sometimes referred to as "nuisance per se" and involves unlawful conduct or statutory violations resulting in harm, conduct involving abnormally or inherently dangerous activity causing harm regardless of fault, or intentional and unreasonable conduct resulting in harm. Qualified nuisance is premised on negligence. It consists of a lawful act that is so negligently or carelessly done as to have created an unreasonable risk of harm which results in injury to another. Both public and private nuisances may be either absolute or qualified.

The law further classifies nuisances as temporary or permanent. A temporary nuisance is one which is abatable by skill and labor. A permanent nuisance is one which will continue indefinitely without change in character. These distinctions are important when considering the measure of damages which may be awarded.

Normally, the defendant in a nuisance action is the person engaged in conduct that interferes with the plaintiff's use and enjoyment of the plaintiff's premises. However, Sections 839 and 840A, Restatement of Law 2d, Torts (1965) and some other jurisdictions impose liability on possessors who are not engaged in the offensive conduct but who permit the activity to be conducted on their property.

Liability may further attach to a previous owner or lessor who knew or should have known of the nuisance and who subsequently transfers ownership of the property to another. See *Moore v. Texaco, Inc.*, 244 F.3d 1229, (10th Circuit, Okla. 2001); *Yarrick v. Kent City* (Mich.App. 1991), 189 Mich.App. 627, 473 N.W.2d 774, 775-776; *Sanfore v. Detroit* (Mich.App. 1985), 143 Mich.App. 194, 371 N.W.2d 904, 907.

CV 621.01 Absolute nuisance–statutory violation *[Rev. 3-18-02]*

COMMENT

The violation of a safety statute creates absolute liability if it is determined that the statute establishes a specific legal requirement for the protection of others. In these circumstances the degree of care exercised is not in issue. In contrast, the violation of a statute that provides a general rule of conduct does not create an absolute nuisance. *Taylor v. City of Cincinnati* (1944), 143 Ohio St. 426; *Rubbo v. Hughes Provision Co.* (1941), 138 Ohio St. 178, 34 N.E. 2d 202; *Great Atlantic & Pacific Tea Co. v. Hughes* (1936), 131 Ohio St. 501, 3 N.E. 2d 415; *Swoboda v. Brown* (1935), 129 Ohio St. 512, 196 N.E. 274; *Portage Markets Co. v. George* (1924), 111 Ohio St. 775, 146 N.E. 283; *Schell v. DuBois, Adm'r* (1916), 94 Ohio St. 93, 113 N.E. 664, L.R.A.1917A, 710; *Uland v. S.E. Johnson Companies* (March 13, 1998), Williams App. No. WM-97-005, 1998 (Ohio App. 6 Dist.) LEXIS 942.

Whether the applicable statute establishes a specific safety requirement is a question of law to be decided by the court.

1. PLAINTIFF'S CLAIM. The plaintiff claims that the defendant created a nuisance and the nuisance caused damages to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the defendant (violated [*insert applicable statutory language*]) which proximately (caused annoyance, injury, or inconvenience to the plaintiff) (endangered the comfort, health, or safety of the plaintiff).

3. PROXIMATE CAUSE.

COMMENT

Drawn from OJI-CV 405.01. The Committee believes that a modification of OJI-CV 405.01 § 3 may be necessary if the facts and circumstances in evidence support an instruction on multiple causes.

(A) SEPARATE ISSUE. A party who seeks to recover for (injury) (damage) must prove not only that the other party created a nuisance, but also that such nuisance

was a (proximate) (direct) cause of (injury) (damage).

(Text continued on page 727)

(B) DEFINED. Proximate cause is an act or failure to act which in the natural and continuous sequence directly produces the (injury) (damage), and without which it would not have occurred. Cause occurs when the (injury) (damage) is the natural and foreseeable result of the act or failure to act.

4. COMPENSATORY DAMAGES. OJI-CV 621.13.

5. PUNITIVE DAMAGES AND ATTORNEY FEES. OJI-CV 315.37 (on or after 1/5/88)

COMMENT

Punitive damages may be awarded for a nuisance claim. *Adkins v. All American Coal Co.* (April 2, 1982), Lawrence App. No. 1465, unreported, 1982 Ohio App. LEXIS 13602 (Ohio App. 4 Dist.).

CV 621.03 Absolute nuisance–abnormally dangerous activity *[Rev. 3-18-02]*

COMMENT

This nuisance classification involves the keeping on one's premises anything that is abnormally dangerous, referred to also as inherently dangerous or ultra hazardous. Although the genesis of this doctrine is embodied in *Rylands v. Fletcher*, 1 Exch. 265, the modern view in Ohio has narrowed the scope to abnormally dangerous activity conducted on one's property and the escape of wild animals. See *Taylor v. City of Cincinnati* (1944), 143 Ohio St. 426. Restatement of Law 2d, Torts (1965), Section 519 provides:

> "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he exercised the utmost care to prevent the harm."

The Ohio Supreme Court has recognized and applied this rule. *City of Cleveland v. Ferrando, a Minor* (1926), 114 Ohio St. 207, 150 N.E. 747 (explosion of an unguarded, unexploded bomb in a public park); *Louden v. City of Cincinnati* (1914), 90 Ohio St. 144, 106 N.E. 970, L.R.A. 1915E, 356, Ann.Cas. 1916C, 1171 and *City of Tiffin v. McCormack* (1878), 34 Ohio St. 638, 32 Am.Rep. 408 (blasting operations); *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.* (1899), 60 Ohio St. 560, 54 N.E. 528, 71 Am.St.Rep. 740, 45 L.R.A. 658 (the handling of explosives). See, also, *Harris, Adm'x v. City of Findlay* (1938), 59 Ohio App. 375, 18 N.E. 2d 413 (fireworks exhibition).

1. PLAINTIFF'S CLAIM. The plaintiff claims that the defendant created a nuisance and the nuisance caused damages to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the

greater weight of the evidence that the defendant (*describe abnormally dangerous activity*) which (caused annoyance, injury, or inconvenience to the plaintiff) (endangered the comfort, health, or safety of the plaintiff).

3. ABNORMALLY DANGEROUS ACTIVITY.

COMMENT

The committee believes that the issue whether the activity is abnormally dangerous is to be decided by the Court. Restatement of Law 2d, Torts (1965), Section 520, Comment l. The factors to be considered are:

-the existence of a high degree of risk of some harm to the person or property of others; and

-the likelihood that the harm that results from it will be great; and

-the inability to eliminate the risk by the exercise of reasonable care; and

-the extent to which the activity is not a matter of common-usage; and

-the inappropriateness of the activity to the place where it is carried on; and

-the extent to which its value to the community is outweighed by its dangerous characteristics.

4. PROXIMATE CAUSE. OJI-CV 621.01 § 3.

5. COMPENSATORY DAMAGES. OJI-CV 621.13.

6. PUNITIVE DAMAGES AND ATTORNEY FEES. OJI-CV 315.37 (on or after 1/5/88).

COMMENT

Punitive damages may be awarded for a nuisance claim. *Adkins v. All American Coal Co.* (April 2, 1982), Lawrence App. No. 1465, unreported, 1982 Ohio App. LEXIS 13602 (Ohio App. 4 Dist.).

CV 621.05 Absolute nuisance–intentional acts *[Rev. 3-18-02]*

COMMENT

This category of nuisance involves the intentional and unreasonable performance of an act which causes annoyance, discomfort or injury to an individual or which causes damages to the land. Ohio has recognized that an intentional act can form the basis for an absolute nuisance. *Jennings Buick, Inc. v. City of Cincinnati* (1978), 56 Ohio St.2d 459; *Interstate Sash & Door Co. v. City of Cleveland* (1947), 148 Ohio St. 325; *City of Barberton v. Miksch* (1934), 128

Ohio St. 169.

1. PLAINTIFF'S CLAIM. The plaintiff claims that the defendant created a nuisance and the nuisance caused damages to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the defendant intentionally and unreasonably (*describe intentional activity conducted by defendant*) which (caused [annoyance] [injury] [inconvenience] to) (endangered the [comfort] [health] [safety] of) the plaintiff.

3. INTENTIONAL. A person acts intentionally when he/she has the (purpose) (conscious objective) to produce a specific result. A person intends an act when it is done purposely, not accidentally. The intent with which a person does an act is known only to himself/herself, unless he/she expresses it to others or indicates it by his/her conduct.

4. UNREASONABLE. A party who seeks to recover for an intentional nuisance must prove that the defendant's conduct was intentional and also that the conduct was unreasonable. The defendant's conduct is unreasonable if the gravity of the harm outweighs the utility of the defendant's conduct.

COMMENT

Drawn from Restatement of Law 2d, Torts (1965), Section 826.

5. GRAVITY OF HARM. When deciding the gravity of the harm to the plaintiff, if any, you will consider all of the following factors:

(A) The extent of the harm; and

(B) The character of the harm; and

(C) The social value of the plaintiff's use or enjoyment of the premises that is affected by the defendant's conduct; and

(D) The suitability to the character of the locality of plaintiff's use or enjoyment of the premises that is affected by the defendant's conduct; and

(E) The burden on the plaintiff to avoid the harm.

COMMENT

Drawn from Restatement of Law 2d, Torts (1965), Section 827.

6. UTILITY OF CONDUCT. When deciding the utility of the defendant's conduct,

if any, you will consider all of the following factors:

(A) The social value of the primary purpose of the defendant's conduct; and

(B) The suitability of defendant's conduct to the character of the locality; and

(C) The impracticability of preventing or avoiding the defendant's conduct.

COMMENT

Drawn from Restatement of Law 2d, Torts (1965), Section 828.

7. OPTIONAL. In deciding whether a nuisance exists, you may consider, among other factors, the nature of the injury, the frequency of the disturbance, the character of the neighborhood, and the past actions taken by the defendant to reduce the disturbance. You must consider the comfort and convenience of persons of ordinary tastes and sensibilities. You must be guided by the generally accepted standard of comfort and convenience. Trifling and insignificant annoyances or inconveniences do not constitute nuisance. Likewise, unsubstantiated or unrealized fears do not constitute nuisance. Nuisance is a question of degree, depending upon varying circumstances.

8. PROXIMATE CAUSE. OJI-CV 621.01 § 3.

9. COMPENSATORY DAMAGES. OJI-CV 621.13.

10. PUNITIVE DAMAGES AND ATTORNEY FEES. OJI-CV 315.37 (on or after 1/5/88)

COMMENT

Punitive damages may be awarded for a nuisance claim. *Adkins v. All American Coal Co.* (April 2, 1982), Lawrence App. No. 1465, unreported, 1982 Ohio App. LEXIS 13602 (Ohio App. 4 Dist.).

CV 621.07 Qualified nuisance *[Rev. 3-18-02]*

COMMENT

Qualified nuisance is based upon negligent conduct. In an action premised on qualified nuisance, "before recovery can be had, it is necessary to find some duty owing to the party complaining and a breach of that duty." *Metzger v. Pennsylvania O. & D.R. Co.* (1946), 146 Ohio St. 406. The overwhelming weight of authority requires, in a qualified nuisance action, that the complaint allege some act of negligence. "As distinguished from absolute nuisance, a qualified nuisance or nuisance dependent upon negligence consists of anything lawfully but so negligently. . . .done or permitted as to create a potential and unreasonable risk of harm which. . . .results in injury to another." *Taylor v. City*

of Cincinnati (1944), 143 Ohio St. 426, 445. For other cases in Ohio involving a qualified nuisance, see *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App. 3d 704; *Christensen v. Hilltop Sportsman Club, Inc.* (1990), 61 Ohio App. 3d 807; *Zang v. Engle* (September 19, 2000), Franklin App. No 00P-290, unreported, 2000 Ohio App. LEXIS 4222 (Ohio App. 10 Dist.).

1. PLAINTIFF'S CLAIM. The plaintiff claims that the defendant created a nuisance and the nuisance caused damages to the plaintiff.

2. PROOF OF CLAIM. Before you can find for the plaintiff, you must find by the greater weight of the evidence that the defendant negligently (*describe conduct*) which (caused annoyance, injury, or inconvenience to the plaintiff) (endangered the comfort, health, or safety of the plaintiff).

3. NEGLIGENCE. OJI-CV 401.01.

4. FORESEEABILITY. OJI-CV 401.07.

5. ADDITIONAL. In deciding whether a nuisance exists, you may consider, among other factors, the nature of the injury, the frequency of the disturbance, the character of the neighborhood, and the past actions taken by the defendant to reduce the disturbance. You must consider the comfort and convenience of persons of ordinary tastes and sensibilities. You must be guided by the generally accepted standard of comfort and convenience. Trifling and insignificant annoyances or inconveniences do not constitute nuisance. Likewise, unsubstantiated or unrealized fears do not constitute nuisance. Nuisance is a question of degree, depending upon varying circumstances.

COMMENT

O'Neil v. Atwell (1991), 73 Ohio App. 3d 631; *Adams v. Snouffer* (1949), 88 Ohio App. 79; *Antonik v. Chamberlain* (1947), 81 Ohio App. 465; *Miller v. Horn* (June 28, 1996), Clark App. Nos. 95-CA-113, 95-CA-114, unreported, 1996 Ohio App. LEXIS 2678.

6. PROXIMATE CAUSE. OJI-CV 621.01 § 3.

7. COMPENSATORY DAMAGES. OJI-CV 621.13.

8. PUNITIVE DAMAGES AND ATTORNEY FEES. OJI-CV 315.37 (on or after 1/5/88).

COMMENT

Punitive damages may be awarded for a nuisance claim. *Adkins v. All American Coal Co.* (April 2, 1982), Lawrence App. No. 1465, unreported, 1982

Ohio App. LEXIS 13602 (Ohio App. 4 Dist.).

CV 621.09 Regulated activity *[Rev. 3-18-02]*

COMMENT

A defendant's activity pursuant to and in compliance with specific statutory authority or a regulatory scheme cannot constitute an absolute nuisance. However, if the activity is conducted negligently, it may constitute a qualified nuisance. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704; *State ex rel. Schoener v. Hamilton Cty.* (1992), 84 Ohio App.3d 794; Restatement of Law 2d, Torts (1965), Section 821 B, Comment *f*.

CV 621.11 Coming to the nuisance *[Rev. 3-18-02]*

COMMENT

"Coming to the nuisance" does not constitute an absolute bar to a nuisance complaint. However, coming to the nuisance may be considered as one factor, among others, relevant in determining whether a defendant's operations are unreasonable. *Williams v. Oeder* (1995), 103 Ohio App.3d 333. According to the weight of authority, the fact that a person voluntarily comes to a nuisance by moving into the sphere of its injurious effect does not prevent the plaintiff from pursuing injunctive relief or damages, especially where, by reason of changes in the defendant's conduct, the annoyance has been increased. See, *Harden Chevrolet Co. v. Pickaway Grain Co.* (1961), 92 Ohio Law Abs 161, 27 Ohio Op.2d 144. See also, *Eller v. Koehler* (1903), 68 Ohio St. 51; Restatement of Law 2d, Torts (1965), Section 840D.

1. COMING TO THE NUISANCE. "Coming to the nuisance" means that the plaintiff acquired land, moved onto it, or improved it after the conduct (began to occur) (occurred) that interfered with the plaintiff's use or enjoyment of the land. Coming to the nuisance is a factor that you should consider in deciding whether the plaintiff may recover on the nuisance claim, if the plaintiff knew of the situation or in the exercise of ordinary care should have known of the situation, and voluntarily placed himself/herself in the area of the activity that he/she now claims to be a nuisance. A person who becomes a resident of a (*describe neighborhood classification such as agricultural, trading or manufacturing*) neighborhood is bound to submit to the ordinary annoyances, discomforts, and injuries which are fairly incidental to the reasonable and general conduct of such neighborhood activity. If you find that the plaintiff came to the nuisance, you will consider this factor in determining whether the defendant's conduct was unreasonable.

2. CHANGED CONDITION. A person who remains as a resident in a neighborhood which gradually becomes a(n) (agricultural) (trading) (manufacturing) (*describe other classification*) is bound to submit to the ordinary annoyances, discomforts, and injuries which are fairly incidental to the reasonable and general conduct of such business in the neighborhood.

CV 621.13 Compensatory damages *[Rev. 1-22-11]*

COMMENT

There are different measures of damages depending upon whether the nuisance is permanent or continuing. Regardless of which measure of damages is available, a plaintiff may also be entitled to additional damages for annoyance and discomfort. The annoyance and discomfort damages may be awarded provided that the plaintiff is an occupant of the land. *Reeser v. Weaver Brothers, Inc.* (1992), 78 Ohio App.3d 681, reversed on other grounds, 121 Ohio St.3d 66, 2009-Ohio-1; *Widmer v. Fretti* (1952), 95 Ohio App. 7.

While a plaintiff must demonstrate some harm to establish a nuisance, a plaintiff need not demonstrate a physical injury. It is enough that the plaintiff's enjoyment of life and property is rendered uncomfortable. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704; *Miller v. Horn* (Jun. 28, 1996), 2d Dist. Nos. 95-CA-113, 95-CA-114. However, while no physical injury is required, in order to recover damages for annoyance and discomfort the plaintiff must establish that the nuisance caused physical discomfort. *Banford v. Aldrich Chem. Co., Inc.*, 126 Ohio St.3d 210, 2010-Ohio-2470.

The four-year statute of limitations found in R.C. 2305.09(D) is applicable to nuisance actions. However, when the nuisance is continuing, the four-year period does not apply except to limit the recovery to damages resulting within the four years preceding the filing of the complaint. *Haas v. Sunset Ramblers Motorcycle Club, Inc.* (1999), 132 Ohio App.3d 875.

1. GENERAL. If you find by the greater weight of the evidence that the defendant created a nuisance and the nuisance proximately caused damages to the plaintiff, you will further decide what damages, if any, should be awarded to the plaintiff.

2. PROPERTY DAMAGES.

(A) PERMANENT. When the damages are (permanent) (irreparable), the measure of damages is the difference in the market value of the property before and after the injury.

COMMENT

Reeser v. Weaver Brothers, Inc. (1992), 78 Ohio App.3d 681, reversed on other

grounds, 121 Ohio St.3d 66, 2009-Ohio-1.

(B) TEMPORARY. When the injury is susceptible to repair, the measure of damages is the reasonable value of the loss of the use of property (plus the reasonable cost of restoration of the property between the time of the injury and the restoration).

COMMENT

Depending upon the facts of the case, a plaintiff may or may not have incurred restoration costs. *Norwood v. Sheen* (1933), 126 Ohio St. 482.

When the property is noncommercial real estate, *Martin v. Design Constr. Servs.* suggests that a plaintiff may be awarded the cost of repair or restoration even if it exceeds the diminution in market value, so long as the cost does not result in excessive compensation and is reasonable under the circumstances. Evidence of the diminution of the fair market value of the property caused by the damage may be considered in deciding the reasonableness of the cost of repairs. *Martin v. Design Constr. Servs.*, 121 Ohio St.3d 66, 2009-Ohio-1. When evidence of market value is introduced, the court may need to draft appropriate additional instructions. See OJI-CV 315.35 § 3 for the definition of "fair market value."

3. LOSS OF USE. (*Use appropriate alternative*)

(A) PROPERTY HELD FOR RENTAL PURPOSES. "Loss of use" means the decrease in the reasonable rental value of the property.

COMMENT

Klein v. Garrison (1951), 91 Ohio App. 418; *Graham & Wagner, Inc. v. Ridge* (1931), 41 Ohio App. 288.

(B) PROPERTY HELD FOR PERSONAL USE. "Loss of use" means the decrease in the reasonable value of the use of the property during the period of the injury.

COMMENT

Norwood v. Sheen (1933), 126 Ohio St. 482.

4. ANNOYANCE AND DISCOMFORT. If you find by the greater weight of the

evidence that the defendant created a nuisance and the nuisance proximately caused damages to the plaintiff, you will further decide whether the plaintiff suffered personal annoyance and discomfort. If you decide the plaintiff has suffered personal annoyance and discomfort, you must then decide what amount of money the plaintiff should recover, if any, in view of the annoyance and discomfort to which the plaintiff may have been subjected. When considering annoyance and discomfort damages, no precise rule for ascertaining the damage can be given as the degree of personal annoyance and discomfort is not susceptible to exact measurement. Although the plaintiff need not have suffered bodily injury, before you can award damages for annoyance and discomfort you must find that the plaintiff has suffered actual physical discomfort as a result of the nuisance.

COMMENT

Reeser v. Weaver Brothers, Inc. (1992), 78 Ohio App.3d 681, reversed on other grounds, 121 Ohio St.3d 66, 2009-Ohio-1; *Widmer v. Fretti* (1952), 95 Ohio App. 7; *Frey v. Queen City Paper Co.* (1946), 79 Ohio App. 64; *Banford v. Aldrich Chem. Co., Inc.*, 126 Ohio St.3d 210, 2010-Ohio-2470.

Only an occupant may recover damages for annoyance and discomfort. Very seldom will there be an issue as to whether the plaintiff is an "occupant." If the facts of a particular case raise the issue of whether the plaintiff is an "occupant," see *Reeser v. Weaver Brothers, Inc.*, supra.

5. DUPLICATION OF DAMAGES. Any amounts that you have decided to award to the plaintiff for any element of damages shall not be considered again or added to any other element of damages. You shall be cautious in your consideration of the damages not to overlap or duplicate the amounts of your award which would result in double damages. For example, any amount of damages awarded to the plaintiff for loss of use must not be awarded again as an element of damages for the plaintiff's annoyance and discomfort. In like manner, any amount of damages awarded to the plaintiff for annoyance and discomfort must not be considered again as an element of damages for loss of use, or any other element of damages.

COMMENT

Drawn from *Fantozzi v. Sandusky Cement Prod. Co.* (1992), 64 Ohio St.3d 601.

Chapter CV 625

CONVERSION

CV 625.01	Definition
CV 625.03	Accrual of action
CV 625.05	By mortgagee
CV 625.07	Abandonment as a defense

CV 625.01 Definition

This is an action brought by the plaintiff against the defendant for alleged conversion by the defendant of plaintiff's property. The action of conversion of personal property is based on the wrongful possession by one party of the property of another. It is the wrongful taking of the property that gives the right of action to the owner of the property against the wrongdoer. It is not necessary for the party taking wrongful possession of the property to assert absolute ownership of it in order to give the owner the right to an action for conversion. If you find from the greater weight of the evidence that the plaintiff was the owner of the property in question and entitled to the immediate possession thereof, and was deprived of that possession by an unauthorized act of the defendant, or by the exercise of dominion over the property inconsistent with the right of possession of the plaintiff, it is a conversion of the property. Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion.

COMMENT

Gillespie & McCulley v. Holland (1914), 3 Ohio App. 116, 20 Ohio C.C.(N.S.) 17, 26 Ohio C.D. 220; *Bear v. Colonial Fin. Co.* (1932), 42 Ohio App. 482, 182 N.E. 521.

CV 625.03 Accrual of action

If you find that the defendant(s) took unlawful possession of the personal property of the plaintiff as described, then the cause of action in favor of the plaintiff(s) arose at the time of the taking, if plaintiff(s) then knew of the same, but if (he) (she) (they) did not know, then as soon as (he) (she) (they) discovered that the goods had been taken, and the identity of the party who had taken them.

COMMENT

Gillespie v. Holland (1914), 3 Ohio App. 116, 20 Ohio C.C.(N.S.) 17, 26 Ohio C.D. 220.

CV 625.05 By mortgagee

Now, if you find by the greater weight of the evidence that the (describe property) was converted on the date set forth, and you further find that the defendant had a valid chattel mortgage on the (describe property) at the time of its conversion, then you should give credit for the amount that you find due the defendant under its mortgage.

If you find by the greater weight of the evidence that (name mortgagee) is entitled to possession of this property by reason of default in payment of the note and mortgage, but in the taking thereof committed a breach of the peace as to constitute a conversion of said property, then in the absence of proof of special damages resulting directly from the wrongful taking, defendant is liable to the plaintiff only for the value of the (describe property) at the time it was taken, less the amount due on said note and mortgage at the time said automobile was taken.

COMMENT

Colonial Fin. Co. v. Bear (1933), 46 Ohio App. 498, 189 N.E. 673.

CV 625.07 Abandonment as a defense

1. It is one of the claims of the defendant that plaintiff abandoned the (describe personal property).

Abandonment as applied to property means a voluntary relinquishment of the possession of a thing by the owner with the intention of terminating his ownership, but without vesting title to the property in any other person.

2. The jury is instructed that abandoned personal property, no matter where found, belongs to the first person who reduces it to possession; the former owner loses all ownership, and cannot recover the property or its value from the finder.

You are instructed that abandonment of personal property, being an unconditional, intentional, and voluntary (never compulsory) relinquishment, is always determined by looking to all the circumstances of the case and by considering the acts and declarations of the one who resists the claim of forfeiture. There can be no abandonment (without an intention to yield possession) (without a purpose to relinquish the property or right of property in question). Neither non-use of the property, or right in question, nor the lapse of any particular time since dominion over it was exercised is conclusive of the claim of abandonment, but such fact may be considered by the jury along with all other facts in the case in deciding the question

of abandonment and intention of the person resisting the claim.

You are further instructed that the burden of proving by the greater weight of the evidence (that he has property, general or special) (actual possession or the right to immediate possession at the time of alleged conversion) is on plaintiff, and if plaintiff fails to so prove, plaintiff can not recover in this action and your verdict must be for the defendant. If, however, plaintiff proves title by prior possession, you are instructed that no presumption of law arises that the right or title thus proven is lost by plaintiff and the defendant has the burden of proving by the greater weight of the evidence that plaintiff abandoned the property. If defendant fails to so prove, your finding on the issue of abandonment will be for plaintiff.

Chapter CV 629

BAILMENTS

CV 629.01 Definitions: duty to return; duty of care

CV 629.03 Bailment by agreement: prima facie case

CV 629.01 Definitions: duty to return; duty of care

COMMENT

The court must decide what cause(s) of action is (are) asserted by plaintiff, as a matter of law, and instruct the jury accordingly. A plaintiff may assert one or more of the following causes of action:

(a) for breach of duty to return the bailed property undamaged, express or implied in a bailment contract (OJI-CV Chapter 629, BAILMENTS);

(b) for negligence specifically alleged by plaintiff as a violation of defendant's duty of care (OJI-CV Chapter 401, NEGLIGENCE);

(c) for breach of an express agreement made between plaintiff and defendant (OJI-CV Chapter 501, CONTRACTS).

The following instructions are pertinent only to bailments.

1. BAILMENT BY AGREEMENT. This case involves a bailment by agreement. When one party delivers property to another for some purpose with the further understanding that the property will be returned (undamaged), a bailment has been created.

COMMENT

David v. Lose (1966), 7 Ohio St.2d 97; 36 O.O.2d 81, 218 N.E.2d 442; 8 Ohio Jurisprudence 3d (1996), Bailments, Section 2.

2. BAILMENT IMPOSED BY LAW. This case involves a bailment imposed by law, which arises when a party (receives) (obtains) possession of property under such circumstances that the law declares him/her to be a bailee with a duty to return the property (undamaged) to the owner, even though there is no agreement between the parties.

COMMENT

Dixon v. Millhorn (1936), 55 Ohio App. 193, 8 O.O. 469, 9 N.E.2d 183.

3. BAILOR, BAILEE. The person who delivers the property is known as the bailor, and the bailee is the person to whom it is delivered. In this case, the plaintiff asserts that he/she is a (bailor) (bailee), that defendant is a (bailee) (bailor), and that the property is (*describe*).

4. TYPES OF BAILMENT.

COMMENT

A bailment by agreement may be compensated, for the mutual benefit of the parties, or uncompensated (gratuitous). If there is a factual dispute about the existence or the nature of the bailment, instructions must be tailored to the factual disputes. *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St. 275, 29 O.O. 426, 58 N.E.2d 658; *Burcham v. Coney Island, Inc.* (1949), 87 Ohio App. 352, 42 O.O. 486, 94 N.E.2d 280. When the type of bailment is a question of law, not of fact, the following instruction may be used.

The court instructs you that the relationship between the parties in this case is a(n) (compensated bailment) (uncompensated or unpaid bailment) (bailment for mutual benefit) (bailment imposed by law).

COMMENT

United States Fire Insurance Co. v. Paramount Fur Service, Inc. (1959), 168 Ohio St. 431, 7 O.O.2d 267, 156 N.E.2d 121; *Ohio Farmers Insurance Co. v. Ohio Casualty Insurance Co.* (1971), 28 Ohio App.2d 170, 57 O.O.2d 231, 275 N.E.2d 877; 8 Ohio Jurisprudence 3d (1996), Bailments, Sections 5–7.

5. DUTY OF CARE: BAILEE FOR COMPENSATION OR MUTUAL BENEFIT.

(a) COMMON LAW BAILMENT:

The duty of care for safekeeping required of a (paid bailee) (bailee for mutual benefit) is that degree of care which an ordinary (cautious) (careful) (prudent) person would exercise under similar circumstances with regard to similar property.

COMMENT

Hotels Statler Co., Inc. v. Safier (1921), 103 Ohio St. 638, 134 N.E. 460; *Pennsylvania Co. v. Miller & Co.* (1880), 35 Ohio St. 541; *Aetna Casualty &*

Surety Co. v. Woody Sander Ford, Inc. (1969), 21 Ohio App.2d 62, 50 O.O.2d 107, 254 N.E.2d 700; *Cherry v. North Fairfield Savings Bank Co.* (1936), 54 Ohio App. 431, 8 O.O. 191, 7 N.E.2d 824; 8 Ohio Jurisprudence 3d (1996), Bailments, Section 33; 8A American Jurisprudence 2d (1997), Bailments, Section 110 et seq.

For instructions on duty of ordinary care, see OJI-CV Chapter 401, NEGLIGENCE.

(b) UNIFORM COMMERCIAL CODE BAILMENT:

(1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful person would exercise under like circumstances (but unless otherwise agreed he/she is not liable for damages which could not have been avoided by the exercise of such care). R.C. 1307.09(A).

COMMENT

Singer Co. v. Scott and Davis Motor Express, Inc. (1981), 436 N.Y.S.2d 508, 79 A.D.2d 227; *United States Borax and Chemical Co. v. Blackhawk Warehousing and Leasing Co.* (1979), 266 Ark. 831, 586 S.W.2d 248; *Citizens Bank and Trust Co. v. SLT Warehouse Co.* (M.D. Ga.1974), 368 F.Supp 1042; *Tremco, Inc. v. Banker* (Aug. 21, 1985), Hamilton App. No.C-840696, unreported.

(2) A warehouseman is a person engaged in the business of storing goods for hire. R.C. 1307.01(A)(8).

6. DUTY OF CARE: UNPAID BAILEE OR BAILEE BY OPERATION OF LAW. An (unpaid) (gratuitous) bailee (bailee by operation of law) is liable for (damages to) (loss of) goods when the (damage) (loss) is proximately caused by his/her failure to exercise (any) (slight) care with regard to the goods. This failure of care is referred to as gross negligence.

COMMENT

Griffith v. Zipperwick and Lodge (1876), 28 Ohio St. 388; *Dixon v. Millhorn* (1936), 55 Ohio App. 193, 8 O.O. 469, 9 N.E.2d 183; 8A American Jurisprudence 2d (1997), Bailments, Section 113 et seq. The division of negligence into degrees such as "slight," "ordinary," or "gross" has been criticized. *United States Fire Insurance Co. v. Paramount Fur Service, Inc.* (1959), 168 Ohio St. 431, 438, 7 O.O.2d 267, 156 N.E.2d 121; *Hershey v. Happy Days Boating Co.* (1976), 52 Ohio App.2d 95, 6 O.O.3d 64, 368 N.E.2d 318; 8A American Jurisprudence 2d (1997), Bailments, Section 113 et seq; 57A American Jurisprudence 2d (1989), Negligence, Section 233 et seq. However, the Ohio Supreme Court has not altered or overruled the requirement of gross negligence

as set forth in *Griffith v. Zipperwick and Lodge, supra,* from which the instruction was drawn.

7. GROSS NEGLIGENCE:

ALTERNATIVE #1. Gross negligence is the failure to exercise any degree of care at all, or the exercise of such a slight degree of care as to show total disregard for the safety of the property.

ALTERNATIVE #2. Gross negligence is an extreme departure from the standard of ordinary care.

COMMENT

Prosser, Handbook on the Law of Torts (1971) 134.

CROSS-REFERENCES: Breach of contract, damages on, see OJI-CV 501.33, OJI-CV 501.35; Personal property, damages to, see OJI-CV 315.23.

CV 629.03 Bailment by agreement: prima facie case

COMMENT

The bailor has the ultimate burden of proof that the bailee failed to exercise his duty of care. Bailor establishes a prima facie case against bailee in an action sounding in contract when he proves (1) the contract of bailment, (2) delivery of the property to the bailee, and (3) failure of the bailee to redeliver the property undamaged at the termination of the bailment. The inference is that the failure to return the property undamaged was caused by bailee's lack of due care. The bailee then has the burden of going forward with evidence to explain his failure to redeliver. The trier of facts is entitled to consider the inference of lack of due care, the evidence explaining the failure to redeliver and any evidence offered to rebut such explanation. *David v. Lose* (1966), 7 Ohio St.2d 97, 36 O.O.2d 81, 218 N.E.2d 442; *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St. 275, 29 O.O. 426, 58 N.E.2d 658; *Aetna Casualty & Surety Co. v. Woody Sander Ford, Inc.* (1969), 21 Ohio App.2d 62, 50 O.O.2d 107, 254 N.E.2d 700.

The following instructions are designed to be used when the bailor relies on a prima facie case and does not assert a cause of action in negligence or contractual duty of care. If there is a factual dispute about any part of the plaintiff's prima facie case, the defendant's explanation or the plaintiff's rebuttal thereto, additional instructions may be necessary.

1. GENERAL. The (plaintiff) (bailor) must prove to you by the greater weight of the evidence that the (defendant) (bailee) failed to exercise the required duty of care for the safekeeping of the property. As stated before, the law creates out of the bailment

relationship a duty to return the property (undamaged) even though the agreement between the parties does not so state.

2. DUTY TO RETURN: PRIMA FACIE CASE; NO EXPLANATION OF BAILEE'S FAILURE. The (plaintiff) (bailor) claims that the (defendant) (bailee) failed to perform his duty to return the property (undamaged). Before you can find for (plaintiff) (bailor), you must find by the greater weight of the evidence the following facts:

(a) That the property was delivered by (plaintiff) (bailor) to (defendant) (bailee),

(b) Under an agreement (*describe*), and

(c) That the (defendant) (bailee) failed to return the property (undamaged).

If these facts are proved to you by the greater weight of the evidence, the court instructs you that (defendant) (bailee) did not perform the duty required of him by law, and you will return a verdict for (plaintiff) (bailor). On the other hand, if any one or more of the foregoing facts have not been proved to you by the greater weight of the evidence, then the (plaintiff) (bailor) has failed to establish his right to recover and you will return a verdict for the (defendant) (bailee).

3. DUTY TO RETURN: PRIMA FACIE CASE; EXPLANATION OFFERED BY BAILEE. The (plaintiff) (bailor) claims that the (defendant) (bailee) failed to perform his required duty to return the property (undamaged). Before you can find for (plaintiff) (bailor), you must find by the greater weight of the evidence the following facts:

(a) That the property was delivered by (plaintiff) (bailor) to (defendant) (bailee),

(b) Under an agreement (*describe*), and

(c) That the (defendant) (bailee) failed to return the property (undamaged).

In response, the (defendant) (bailee) claims that his failure to return the property (undamaged) was not caused by his fault, but (by some act consistent with his exercise of the required duty of care) (despite his exercise of the required duty of care) (*describe*). You must decide from all the facts and circumstances in evidence as presented by both (plaintiff) (bailor) and (defendant) (bailee) whether the (plaintiff) (bailor) has proved to you by the greater weight of the evidence that the (defendant) (bailee) failed to exercise the required duty of care for the safekeeping of the property.

4. PROXIMATE CAUSE. OJI-CV Chapter 405, PROXIMATE CAUSE.

COMMENT

The standard instructions on proximate cause may have to be tailored to fit the evidence.

5. CONCLUSIONS. If you find by the greater weight of the evidence that (defendant) (bailee) failed to exercise the required duty of care for the safekeeping of the property, and that such failure was a proximate cause of (damage) (loss) to (plaintiff) (bailor), then your verdict may be for (plaintiff) (bailor). You will then consider the matter of damages. On the other hand, your verdict may be for (defendant) (bailee) if you find that the evidence is equally balanced on any of those issues, or if you find that the (defendant) (bailee) (returned the property [undamaged]) (exercised the required duty of care), or if you find that the (damage) (loss) of (plaintiff) (bailor) was not proximately caused by the (defendant's) (bailee's) fault.

6. DAMAGES. OJI-CV Chapter 315, DAMAGES.

Chapter CV 633

WILLS

CV 633.01	Wills, issue, burden
CV 633.03	Mental capacity, capacity to make a will, sound mind and memory
CV 633.05	Under restraint (undue influence)
CV 633.07	Conclusion or summary
CV 633.09	Verdict
CV 633.11	Revocation

CV 633.01 Wills, issue, burden

1. DEFINITIONS.

(a.) WILL. A will (last will and testament) is a written instrument executed with the formalities required by the Ohio Revised Code whereby a person makes a disposition of his property to take effect after his death.

(b.) TESTATOR. A person who dies leaving a will is said to have died testate and is referred to as testator if a male, and as testatrix if a female.

(c.) PROBATE. Probate is a court procedure by which a will is proved to be valid or invalid.

2. LEGAL REQUIREMENTS OF WILL. There are certain legal requirements set forth in the Ohio Revised Code that must be met for a will to be valid. They are:

(a.) The person must be 18 years of age or older;

(b.) The person must be of sound mind and memory;

(c.) The person must not be under restraint.

3. ADMISSION TO PROBATE. For a will to be admitted to Probate it:

(a.) Must be in writing;

(b.) Must be signed at the end by the testator (party making it) (some person at the testator's request and in his presence) in the presence of at least two witnesses (signed at the end by the testator who later acknowledges his signature to at least two witnesses).

4. OPTIONAL. In this case the parties agree, and there is no dispute that the testator signed (in the presence of at least two witnesses) (and later acknowledged his signature to at least two witnesses).

5. DISPOSITION OF PROPERTY. Even though a will is admitted to Probate, it does not mean it validly disposes of the property of the testator according to his wishes.

6. ISSUE. The plaintiff(s) claims that the testator (was not of sound mind or memory) (was under restraint) and therefore the will is not valid and should be set aside. The issue in this case for you to decide is whether the will of _____ admitted to Probate is valid. You must decide if the testator was (not of sound mind and memory) (was under restraint).

COMMENT

There probably will be no dispute that the testator was 18, that the will was properly executed or that the testator's or witnesses' names were not forged. If the latter becomes a jury question, apply R.C. 2913.01 or OJI-CR 513.31(A) § 7. The judge may need to draft a special conclusion paragraph if the issue is forgery or improper execution.

7. BURDEN. The burden of proof rests upon the plaintiff(s) to prove by a preponderance (greater weight) of the evidence that the testator (was not of sound mind and memory) (was under restraint or undue influence).

8. PREPONDERANCE. OJI-CV 303.05.

COMMENT

Though the words "sound mind and memory" and "not under restraint" have been in the statute at least since 1932, no brief definition has been (before now) attempted. "Undue influence" and "restraint" have been used interchangeably. Note deletion of instruction on presumption. See *West v. Henry* (1962), 173 Ohio St. 498, 501, 502, 20 O.O.2d 119, 184 N.E.2d 200; OJI-CV 309.01.

9. SOUND MIND AND MEMORY. If one at the time of making a will understands the nature, extent, and scope of the business he is about to transact, and possesses that degree of mental strength which would enable him to understand the nature and extent of his property, the identity of those who have natural claims on his bounty, and his relation to members of his family, he is, in law, considered a person of sound mind and memory.

COMMENT

See OJI-CV 633.03, mental capacity.

10. RESTRAINT (ADDITIONAL). The restraint necessary to invalidate a will must

be such a prohibition of action or a holding back from action that the mind of the (testator) (the person making the will) is controlled in the (making) (execution) (completion) of the will (questioned) (being contested).

COMMENT

See OJI-CV 633.05.

CV 633.03 Mental capacity, capacity to make a will, sound mind and memory

1. GENERALLY. In determining the soundness of the mind and memory of the testator, the law does not undertake to determine the level of a person's intelligence nor to define the exact quality of mind and memory which a testator must possess at the time a will is made.

2. ELEMENTS. However, the law requires:

(a.) That the testator understand that he is making a will to dispose of his property at death.

(b.) That the testator understand generally the nature and extent of his property.

(c.) That the testator have in his mind the names and identity of those persons who are his relatives, next-of-kin, or the natural objects of his bounty and understand his relationship to them.

3. MENTAL CAPACITY REQUIREMENTS. A testator is not required to have sufficient mental capacity to make a contract or to conduct normal business affairs. He must, however, have a sufficiently active mind and memory to understand the three conditions just given to you. He must be able to remember them a sufficient length of time to consider their obvious relations to each other, and to be able to form a rational judgment with reference to them, even though he may not be able to understand and appreciate these matters as well as a person who has vigorous health, in both mind and body. It is not necessary that he be aware of these three conditions and have them in his mind at all times, since his health and mental condition may vary from time to time. But he must have them in mind during the time that he signs the will.

CV 633.05 Under restraint (undue influence)

1. ELEMENTS. Being under restraint and being subject to undue influence are one and the same. The essential elements of undue influence are:

(a.) A testator is a person who is or can be influenced by reason of advanced age, physical infirmities, mental condition, fear, or for any other reason would yield to the desire or will of another person or persons;

(b.) The opportunity for a person or persons to exert it;

(c.) The fact of improper influence exerted or attempted;

(d.) A will showing the effect of such influence.

2. GENERAL INFLUENCE. General influence, however strong or controlling, is not undue influence unless it is brought to bear directly upon the act of preparing the will and imposes another person's plans or desires upon the testator. If the will, as finally executed, expresses the free and voluntary plans and desires of the testator, the will is valid, regardless of the exercise of influence.

3. UNDUE INFLUENCE. Undue influence sufficient to invalidate a will is that which substitutes the plans or desires of another for those of the testator. The influence must be such as to control the mind of the testator in the making of his will, to overcome his power of resistance, and to result in his making a distribution of his property which he would not have made if he were left to act freely and according to his own plans and desires.

4. UNDUE INFLUENCE (ADDITIONAL). The mere existence of undue influence or an opportunity to exercise it, although coupled with interest or motive to do so, is not sufficient to invalidate a will. Such influence must actually be exerted on the mind of the testator with respect to the execution of the will in question. It must be shown that the undue influence resulted in the making of a will containing the disposition of property that the testator would not have otherwise made.

5. ALTERNATIVE. To invalidate a will, the undue influence exercised must overpower and control the mind of the testator so as to destroy his freedom of thought, and force him to express the plans and desires of another rather than his own. The mere presence of influence is not sufficient. Undue influence must be present and effective at the time of the execution of the will, causing the testator to make a disposition of his property which he would not otherwise have made.

CV 633.07 Conclusion or summary

1. The fact that a person who has the capacity to make a will disposes of his property in an unnatural manner, or unjustly, or not equally and at variance with earlier statements by the testator concerning his relatives or next-of-kin, or the natural objects of his bounty, does not invalidate his will unless the contestants prove by the greater weight of the evidence that the testator was not of sound mind and memory or that undue influence was actually exercised on the testator at or prior to the time of the making of the will, and that such (lack of mental capacity) (undue influence) was in operation at the time of the execution of the will, and that the (lack of mental capacity) (undue influence) (resulted in a) (was used for the purpose of obtaining, producing or coercing a) will in favor of particular individuals.

2. CONSIDER. You have the right to consider evidence tending to show that the will was just or unjust, reasonable or unreasonable, natural or unnatural; the value and nature of testator's estate; financial condition of those who might naturally expect to be beneficiaries at the time this will was made, and any other factors that you find from

the evidence, in determining whether, at the time of the execution of the will, the testator was (of sound mind and memory sufficient to legally execute a will) (under restraint or subject to undue influence).

CV 633.09 Verdict

VERDICT: We, the Jury, find that the instrument dated _____, IS/IS NOT the last will and testament of _____ deceased. (Circle appropriate word or phrase according to your finding.)

CV 633.11 Revocation

1. WILL REVOCABLE. The essence of a will is that it is revocable, and the power to (execute) (make) a will implies the power to revoke it. The statutes provide the manner of revocation.

"A will shall be revoked by the testator tearing, canceling, obliterating, or destroying it, with the intention of revoking it, by the testator himself, or by some person in his presence, or by his express written direction. . . ."

2. ISSUE. In this connection, the sole question for you to consider under the evidence before you is: Did the testator, during his lifetime, tear, cancel, obliterate or destroy said will himself, or by some person in his presence, or by his direction, with the intention of revoking it.

3. REVOCATION—HOW DEMONSTRATED. Revocation is an act of the mind, which must be demonstrated by some outward and visible sign. The testator must intend to revoke his will, and must perform one of the acts provided by statute, in concurrence with such intent. An intention alone does not operate as a revocation. The intent may be inferred from the nature of the act, or it may be shown by other evidence, but it must, in some persuasive way, be made to appear.

4. LACK OF CAPACITY. One lacking testamentary capacity, at the time of an attempted revocation, is not competent to revoke a prior will.

COMMENT

See OJI-CV 633.03, mental capacity.

Chapter CV 637

GIFTS

CV 637.01	Definition
CV 637.03	Acceptance by donee presumed
CV 637.05	Essentials of a valid gift
CV 637.07	Clear and convincing proof required
CV 637.09	Gift of mortgage or money represented by mortgage
CV 637.11	Gift upon condition of return

CV 637.01 Definition

The requisites of a gift inter vivos are an intention on the part of the donor, or giver, to make an immediate gift of property and the delivery thereof to the donee, or receiver of the gift, or to a third person as trustee for the donee, with relinquishment of all dominion and control over the property by the donor.

COMMENT

Streeper v. Myers (1937), 132 Ohio St. 322, 8 O.O. 78, 7 N.E.2d 554 .

CV 637.03 Acceptance by donee presumed

Acceptance by the donee of a gift beneficial in character will be presumed, and this presumption prevails where the gift is delivered to a third person as trustee for the donee without the donee's knowledge.

COMMENT

Streeper v. Myers, supra.

CV 637.05 Essentials of a valid gift

The essentials of a valid gift inter vivos are (1) an intention on the part of the donor to transfer the title and right of possession of the particular property to the donee then and there and (2), in pursuance of such intention, a delivery by the donor to the donee of the subject matter of the gift to the extent practicable or possible, considering its nature, with relinquishment of ownership, dominion and control over it.

COMMENT

Bolles v. Toledo Trust Co. (1936), 132 Ohio St. 21, 7 O.O. 60, 4 N.E.2d 917.

CV 637.07 Clear and convincing proof required

To support a gift inter vivos, there must be clear and convincing proof, first, of an intention on the part of G. B. to transfer the title and right of possession of the securities to C. B. then and there, and, second, in pursuance of such intention, a delivery by G. B. to C. B. of the securities to the extent practicable or possible considering its nature, with relinquishment by G. B. of ownership, dominion and control over it.

COMMENT

Bolles v. Toledo Trust Co., supra; Gano v. Fisk (1885), 43 Ohio St. 462, 469, 3 N.E. 532; *Flanders v. Blandy* (1887), 45 Ohio St. 108, 113, 12 N.E. 321, 322. But it is said there is no rule requiring that such evidence be direct and positive. *Miller v. McLean* (1909), 11 Ohio C.C.(N.S.) 424, 21 Ohio C.D. 64.

CV 637.09 Gift of mortgage or money represented by mortgage

The money having been paid by B. to the building and loan company when the title to the property stood in the name of plaintiff and her husband, and the mortgage having been canceled on the mortgage itself and upon the records of the recorder's office, the jury will determine from these acts, and any declarations which the deceased may have made, and all the evidence, what the fact was, whether or not there was a gift or whether it was not a gift; but I may say that absolute certainty is not possible, nor is it required in the determination of the facts by the jury. The jury is allowed by law to deal in what may be called probabilities. The question is whether it was probably a gift. If the evidence is evenly balanced between the parties, of course the plaintiff must fail upon the question of the gift. If it was the intention of J. B. Sr., at the time of paying the amount of the mortgage, as claimed by plaintiff, the payment and cancellation thereof on the mortgage and on the record, would, in such event, be a sufficient constructive delivery of the subject of the alleged gift. Now the court is not giving any opinion upon that matter at all, because it is left entirely with the jury, and the jury must deduce from all of the circumstances whether or not there was an intention to make a gift. You are the exclusive judges of the fact. The court merely states that if you should find from the evidence that it was his intention to make the gift at the time, then the court states as matter of law, that there would be a sufficient delivery by the cancellation upon the mortgage and upon the record without anything further being done. If, however, he paid this money on the mortgage without intending to make a gift to the plaintiff as claimed, but because of the admitted fact here that he held a second mortgage on the property, and that he paid the building and loan mortgage to protect

his second mortgage, but under a mistake of his legal rights in the matter of preserving the lien of the mortgage for his own protection, he failed to take such steps that would on its face protect him in the matter, and if he did not intend in fact to cancel the lien of the mortgage but expected to retain it and preserve it for his own protection, but failed to do so in a legal manner, in such event he would, in law, be entitled to be subrogated in equity for the rights of the lien of the mortgage, and in such case there would, of course, be no gift.

Now it is a question for the jury to determine what his intention was, whether he did intend to pay that to protect his own interest, and whether he did make the mistake; whether he did not intend to have the mortgage canceled, and whether he intended to preserve the lien. Those questions are entirely within the province of the jury to determine.

COMMENT

Breen v. Breen, Franklin County Common Pleas Court.

CV 637.11 Gift upon condition of return

The plaintiff makes an affirmative claim that he turned over $3,000 by a check to the defendants in the early part of 1952 for the purpose of their holding it for him and so send him such parts or all of it as he requested, and that this was done on the basis of a trip to Canada. Essentially, the claim of the plaintiff here is that this money, represented by the check, was turned into the custody of the defendants, that they would hold it for him, pay it over as he asked for it.

That is denied by the defendants. Their position is that the transaction was an out-and-out gift. Since the plaintiff has made an affirmative claim as to the nature of the transaction, namely, that the money was turned over to the defendants to hold for him and pay out as he asked it to be paid out to him or on his order, since that affirmative claim has been made and is denied by the defendants, in order for the plaintiff to prevail in this law suit, he must establish, essentially, that that was the transaction in order to be entitled to a verdict at your hands.

COMMENT

Hanisko v. Hanisko (App. 1956), 76 Ohio Law Abs. 600, 147 N.E.2d 629.

TITLE 7

CIVIL SUBJECT MATTER INSTRUCTIONS: MISCELLANEOUS

Chapter CV 701 HUSBAND AND WIFE
Chapter CV 705 PATERNITY
Chapter CV 709 INSURANCE
Chapter CV 713 CIVIL RIGHTS

Chapter CV 701

HUSBAND AND WIFE

CV 701.01	Liability of husband for support
CV 701.03	Burden of proof; necessaries
CV 701.05	Proof of adultery
CV 701.07	Husband not unconditionally liable for necessaries
CV 701.09	Liability of husband for negligence of wife
CV 701.11	Necessaries
CV 701.13	Goods purchased on husband's credit
CV 701.15	Determination of heirs; common-law marriage

CV 701.01 Liability of husband for support

Under the law of Ohio, husband and wife contract toward each other obligations of mutual respect, fidelity and support. The husband is the head of the family and may choose any reasonable place or mode of living and the wife must conform thereto. The husband must support himself and his wife as long as he is able to do so.

COMMENT

Mark v. Mark (1945), 145 Ohio St. 301, 30 O.O. 534, 61 N.E.2d 595; R.C. 3103.01 *et seq.*

If a husband neglects to make adequate provision for the support of his wife, any other person, in good faith, may supply her with necessaries for her support, and recover the reasonable value thereof from the husband but if a wife abandons her husband, he is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him. If you find from the evidence that the defendant in this case maintained a home for his wife, which was as good as his means would permit, and that she left the home and returned to the home of her father, the plaintiff in this case, your verdict should be for the defendant unless you find that the defendant was guilty of misconduct which justified the wife in abandoning the home and neglect on the part of the defendant to make adequate provision for the support of his wife, and that the plaintiff, in good faith, furnished necessaries for her support.

COMMENT

Hardy v. Smith (1920), 31 Ohio C.A. 558, 13 Ohio App. 399.

CV 701.03 Burden of proof; necessaries

It is admitted in this case that the plaintiff rendered medical services to the defendant's wife, who was living separate from the defendant at the time such services were rendered. You are instructed that the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant failed to provide for his wife's support and also that the wife was justified in abandoning the defendant because of his misconduct.

COMMENT

Hare v. Gibson (1876), 32 Ohio St. 33; *Morse v. Lewis* (1921), 15 Ohio App. 108.

CV 701.05 Proof of adultery

You are further instructed that the defendant, in order to exonerate him from liability to support his wife on account of her allegedly lewd conduct, must prove that she had been guilty of adultery. For such purpose, it is sufficient to prove a single act of adultery.

COMMENT

Howard v. Trustees of Whetstone Twp. (1841), 10 Ohio 365.

CV 701.07 Husband not unconditionally liable for necessaries

A husband is not unconditionally liable for necessaries furnished his wife. Under the law, if a husband neglects to make adequate provision for the support of his wife, any other person, in good faith, may supply her with necessaries for her support, and recover the reasonable value thereof from her husband. In order to recover in this case the plaintiff must prove by a preponderance of the evidence (1) that the defendant failed to make adequate provision for the support of his wife; (2) that the services rendered were reasonably necessary, and (3) that the services were rendered on the credit of the defendant and not on the credit of the wife. With respect to the third item, the question for you to determine is: Upon whose credit did the plaintiff render the services in question? In order to return a verdict for the plaintiff, you must find by a preponderance of the evidence that the services were rendered upon the credit of the defendant and not upon the credit of his wife.

COMMENT

Tille v. Finley (1933), 126 Ohio St. 578, 186 N.E. 448; *Attorneys Serv. Co. v. Monk* (1925), 19 Ohio App. 16.

CV 701.09 Liability of husband for negligence of wife

In this case the plaintiff claims that the wife, Mrs. B., was the agent or servant or employe of the husband. The husband is not liable for the wife's alleged negligence merely because of such relationship. His liability, if any, must rest upon the relationship of principal and agent or that of master and servant. Defendant's mere ownership of the automobile is not enough to create a liability for his wife's negligence, if she was negligent. To have that result, the act complained of must have been done within the scope of the wife's employment and in conducting what is called the husband's business or affairs; although the authority to so represent the husband need not be expressed in words, but may be implied from the precedent course of conduct.

COMMENT

Liability of owner of car, see OJI-CV 423.05; Owner present in car, see OJI-CV 423.07.

Bretzfelder v. Demaree (1921), 102 Ohio St. 105, 130 N.E. 505.

CV 701.11 Necessaries

Necessaries for which a husband may be held liable include food, board, lodging; clothing and articles of utility and adornment, suitable to the rank and condition of the family.

COMMENT

Porter & Moir v. Briggs (1874), 38 Iowa 166.

The term is not confined to articles of food and clothing required to preserve life or personal decency, but also includes such articles of utility and adornment as are suitable to maintain the wife according to the estate and rank of her husband. It is for you to determine from the evidence whether the articles furnished to the defendant's wife by the plaintiff were necessaries. Unless you find from a preponderance of the evidence that the defendant either refused or neglected to provide his wife with suitable support, your verdict should be for the defendant.

COMMENT

Bergh v. Warner (1891), 47 Minn. 250, 50 N.W. 77; *Jordan Marsh Co. v. Cohen* (1922), 242 Mass. 245, 136 N.E. 350.

CV 701.13 Goods purchased on husband's credit

I call your attention to the question because, if that account was opened by Mrs. U. in her husband's name with his consent and knowledge, I think you would be entitled to infer from that fact that it was his intention that she should use that account, and to some extent, an implied authority was conferred upon the plaintiff to extend her credit upon his name. You, however, are to be judge of the evidence.

COMMENT

Wanamaker v. Ulizio (1925), 102 N.J.L. 166, 130 A. 555.

CV 701.15 Determination of heirs; common-law marriage

You are instructed that you are to determine the heirs of William T. Markley, deceased, existing at the time of his death, and you are to determine this not by the number of witnesses testifying to a particular state of facts, but by considering all of the evidence submitted.

If you should find from all of the evidence submitted that Eleanor Hudson Markley was married to William T. Markley by a statutory marriage, then you should find that she is his surviving spouse and by virtue thereof his sole heir.

If you should find that said William T. Markley was not married to Eleanor Hudson Markley by a statutory marriage, then you should proceed to the consideration of the question whether or not said parties were married to each other, by what is termed in law a common-law marriage.

An agreement of marriage is in praesenti when made by parties competent to contract accompanied and followed by cohabitation as husband and wife, they being so treated and reputed in the community and circle in which they move, and establishes a valid marriage at common law.

The primary purpose in the law recognizing common-law marriages is to protect the rights of innocent parties.

Before you can find that a common-law marriage existed in this case, you must first find by clear and convincing evidence:

1. That Eleanor Hudson Markley and William T. Markley were competent to enter into the marriage relation.

2. That they made an agreement to live together as husband and wife and that this was followed by cohabitation.

3. That they held themselves out to the public as husband and wife and they were treated and reputed in the community in which they resided as husband and wife.

4. And that Eleanor Hudson Markley is an innocent person whose rights should be protected.

A so-called common-law marriage would be upheld if a child or children were born of such a marriage, because the child or children would then be innocent parties to be protected. A woman entering into a so-called common-law marriage relationship with a man would likewise be an innocent party where there are no children if she was ignorant of statutory requirements for marriage, or if she believed that statutory requirements had been complied with.

Evidence may be either direct or circumstantial, or both. If a witness testifies from his personal knowledge, that is called direct or positive evidence; or if he testifies directly to something that he has seen or heard, that is called direct evidence, providing the evidence is material to be proven in the case. But it is not always possible to ascertain the truth by evidence of this character, hence the law permits the introduction of what is called circumstantial evidence. By circumstantial evidence is meant the proof of certain facts and circumstances in a given case from which a jury may infer other connected facts, which usually and reasonably follow according to the common experience of mankind. The credibility of witnesses detailing circumstances in evidence, or the weight of such circumstances, if the jury find that they occurred, are to be determined solely by you.

COMMENT

Markley v. Hudson (1944), 143 Ohio St. 163, 28 O.O. 81, 54 N.E.2d 304.

Chapter CV 705

PATERNITY

CV 705.01	Issues
CV 705.03	Presumption of paternity complainant other than defendant R.C. 3111.03(A)
CV 705.05	Presumption of paternity presumptive person—defendant R.C. 3111.03(B)
CV 705.07	Serological tests
CV 705.09	Exhibit child
CV 705.11	Parties competent to testify
CV 705.13	Conclusion and verdicts
CV 705.15	Jury's duty

(See R.C. CHAPTER 3111—UNIFORM PARENTAGE ACT)

CV 705.01 Issues

1. GENERAL. The complaint claims that a child was born on the (_____ day of _____, _____) and that the (defendant) (*one of the defendants*) is the father of that child.

The elements of this issue are:

(1) Did the mother of the child give birth to the child?

(2) Is (the defendant) (any one of the defendants) the father of that child?

2. OBJECT. The object of this trial is to establish and determine a parent and child relationship.

3. PARENT AND CHILD RELATIONSHIP. A parent and child relationship is the legal relationship that exists between a child and the child's natural or adoptive parent and upon which the law imposes and confers rights, privileges, and obligations. R.C. 3111.01.

4. ISSUES—ALTERNATIVE. The complaint alleges that on or about the _____ day of _____, _____, the mother became pregnant by (*describe*). Your sole duty is to decide whether (*describe*) is the natural father of the child.

It is not necessary that the complainant prove the exact time of intercourse, but the act of intercourse must be shown to have occurred on such a date as to satisfy you by the greater weight of the evidence that the child was the result of such intercourse. Before

the person can be found to be the father, the complainant must prove by the greater weight of all of the evidence that the person (stated) (alleged) to be the father had intercourse with the mother at a time which falls within the gestation period.

5. GESTATION PERIOD. The usual gestation period is approximately 280 days. This is approximately the time that elapses between conception and birth and may vary somewhat depending upon the condition of the mother. It is not necessary to prove the exact date upon which the mother became pregnant but the act of intercourse must be shown to have occurred on such a date that will satisfy you that the birth was the result of such intercourse. If you are satisfied by the greater weight of the evidence that the mother became pregnant by (*describe*) within the gestation period then it is your duty to bring in a verdict against that person.

COMMENT

Testimony of sexual access with the mother at a time other than the probable time of conception is inadmissible unless offered by the mother.

CV 705.03 Presumption of paternity complainant other than defendant R.C. 3111.03(A)

1. PRESUMPTION. Certain evidence has been introduced during the trial that

(*Use appropriate alternative*)

(1) The man and the child's mother have been married, and the child is born within 300 days of termination of the marriage by (death) (divorce) (dissolution) (annulment) or (pursuant to a separation agreement).

(2) The man and the child's mother attempted to marry prior to the child's birth; the marriage is or could be declared invalid; the child is born within 300 days of termination of the (marriage) (co-habitation).

(3) The man and the child's mother attempted to marry *after* the child's birth and:

(a) The man acknowledged his paternity before a notary public.

(b) The man, with his consent, is named as father on the child's birth certificate.

(c) The man is required to support the child by a written, voluntary promise or court order.

(4) The man, with his consent, signs the child's birth certificate as an informant.

(5) A court or administrative body (*describe*), pursuant to law, has ordered that genetic tests be conducted to determine the father and child relationship and the result of the genetic tests indicate a probability of 95% or greater that the man is the biological father of the child,

COMMENT

R.C. 3111.03(A) as amended April 11, 1991.

If you find (any of) those circumstances have been proved by the greater weight of the evidence, the Court instructs you that (*name the person so presumed, other than the defendant*) is presumed to be the child's natural father.

2. PRESUMPTION—NOT CONCLUSIVE. However, this presumption is not conclusive but may be (overcome) (rebutted) by clear and convincing evidence. The burden is on the plaintiff to (overcome) (rebut) by clear and convincing evidence that _____ is not the father of the child.
(*insert name*)

COMMENT

If two or more conflicting presumptions arise, the court shall determine which presumption controls.

3. CONCLUSION. If you find that this presumption has not been (rebutted) (overcome) by clear and convincing evidence then he is not the father of said child and you must return a verdict for the defendant. On the other hand if you find that the plaintiff has (rebutted) (overcome) the presumption by clear and convincing evidence, then it will be your duty to consider further whether the plaintiff has proved the other elements by the greater weight of the evidence.

4. CLEAR AND CONVINCING. Clear and convincing evidence means evidence which will establish in your mind a firm belief and conviction of the truth of the matter. It is that amount of evidence which is so certain and so trustworthy that it will overcome the presumption I just told you about that _____ is the father of the child.

5. CO-HABITATION. The living together of two persons of opposite sex who are not lawfully married with the implication that they habitually practice sexual relations.

CV 705.05 Presumption of paternity presumptive person—defendant R.C. 3111.03(B)

1. PRESUMPTION. Certain evidence has been introduced in the trial that

(*Use appropriate alternative*)

(1) The man and the child's mother have been married, and the child is born within 300 days of termination of the marriage by (death) (divorce) (dissolution) (annulment) or (pursuant to a separation agreement).

(2) The man and the child's mother attempted to marry prior to the child's birth; the

marriage is or could be declared invalid; the child is born within 300 days of termination of the (marriage) (co-habitation).

(3) The man and the child's mother attempted to marry *after* the child's birth and:

(a) The man acknowledged his paternity before a notary public.

(b) The man, with his consent, is named as father on the child's birth certificate.

(c) The man is required to support the child by a written, voluntary promise or court order.

(4) The man, with his consent, signs the child's birth certificate as an informant.

(5) A court or administrative body (*describe*), pursuant to law, has ordered that genetic tests be conducted to determine the father and child relationship and the result of the genetic tests indicate a probability of 95% or greater that the man is the biological father of the child.

COMMENT

R.C. 3111.03(A) as amended April 11, 1991.

If you find (any of) those circumstances have been proved, the Court instructs you that (*defendant*) is presumed to be the child's natural father.

2. PRESUMPTION—NOT CONCLUSIVE. However, this presumption is not conclusive but may be (overcome) (rebutted) by clear and convincing evidence. While the burden of proof by the greater weight of the evidence in this case is on the plaintiff and that burden never shifts, the burden of coming forward to (rebut) (overcome) the presumption is on the defendant and he must rebut this presumption by clear and convincing evidence. If you find that the defendant has not (rebutted) (overcome) the presumption then you must return a verdict for the plaintiff.

COMMENT

If two or more conflicting presumptions arise, the court shall determine which presumption controls.

3. CLEAR AND CONVINCING. Clear and convincing evidence we mean evidence which will establish in your mind a firm belief or conviction as to the truth of the matter. It is that amount of evidence which is so certain and so trustworthy that it will overcome the presumption I just told you about which in this case is that the defendant is the natural father of the child.

4. CO-HABITATION. The living together of two persons of opposite sex who are not lawfully married with the implication that they habitually practice sexual relations.

CV 705.07 Serological tests

1. In this case, you heard the testimony of (a witness) (witnesses) testifying about a series of serological tests specifically selected because of their known genetic transmission, including tests for the presence or absence of common blood antigens, related blood serums, antigens, human lympholyte antigens, serum enzymes and serum proteins. The series of tests were made by qualified experts as determined by the court and you have heard the expert's testimony as to their results and as to their opinions.

2. EXPERT TESTIMONY. OJI-CV 309.11.

CV 705.09 Exhibit child

1. The court permitted the plaintiff to exhibit the child to the jury. This was done to enable you to judge whether or not there was a resemblance to the alleged father. This is a circumstance which you may consider in deciding whether or not (*describe*) is the father of the child.

CV 705.11 Parties competent to testify

1. The *defendant* is a competent witness on his (*or her*) own behalf and his (her) testimony is to be received by you and weighed by the same rules as the testimony of other witnesses. In passing upon the weight you will give to his (her) testimony you may take into consideration the fact of his interest in the result of the trial. The *plaintiff* is a proper witness in her (his) own behalf and the question of her (his) (credibility) (believability) is left to the jury and you may take into consideration the fact of her (his) interest in the result of the trial.

2. All parties are competent to testify. Their testimony is to be weighed by the same rules that apply to all other witnesses.

CV 705.13 Conclusion and verdicts

1. CONCLUSION. If upon consideration of all of the facts and circumstances you find by the greater weight of the evidence that the person alleged to be the father is the father of said child, your duty is to render a verdict (that he is the father of said child) (for _____). If, on the other hand, upon consideration of such evidence, it is your opinion the weight thereof is equally balanced or that the greater weight is that he is not the father of the child, your duty is to return a verdict (that the defendant is not the father of said child) (for _____).

2. VERDICTS. You will have two forms of verdicts. No inference is to be drawn from the order in which the court discusses the verdicts. One verdict form states that the (defendant) (plaintiff) *is* the father. The other verdict form states that the defendant is not the father.

CV 705.15 Jury's duty

1. Your duty is confined to deciding parentage. Any judgment thereafter will be

decided by the court as a matter of law. It is your duty to carefully weigh the evidence, to decide the disputed questions of fact, to apply the instructions of the court to your findings, and to render your verdict accordingly. In fulfilling your duty your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and without bias, sympathy or prejudice, so that the people will feel that their case was fairly and impartially tried. If, during the course of the trial, court said or did anything which you consider an indication of the court's view on the facts, you are instructed to disregard it.

2. CLOSING REMARKS. OJI-CV Chapter 317.

Chapter CV 709

INSURANCE

CV 709.01	Proof of loss or waiver
CV 709.03	Time of proof of loss
CV 709.05	Proofs, limited purpose
CV 709.07	"Earliest practical moment"
CV 709.09	Vacant and unoccupied
CV 709.11	Arson
CV 709.13	Loss from fire or explosion
CV 709.15	Total loss
CV 709.17	False representation
CV 709.19	Insurable interest
CV 709.21	Insurance on steamboat
CV 709.23	Chimney fire
CV 709.25	Burden on plaintiff to prove accidental injury
CV 709.27	Accident or disease
CV 709.29	Death from accident or disease
CV 709.31	Accidental means
CV 709.33	Burden; death by accidental means
CV 709.35	Voluntary exposure to unnecessary danger
CV 709.37	Exempted risk
CV 709.39	Intoxicating liquor
CV 709.41	"Theft" defined
CV 709.43	Beneficiary intended
CV 709.45	Burden of proving unsound health upon defendant
CV 709.47	Sound health
CV 709.49	Presumption of sanity
CV 709.51	Burden upon defendant to clearly prove false answer material
CV 709.53	Good health
CV 709.55	Fraud of insurance agent
CV 709.57	Total disability—loss of arm
CV 709.59	Total disability defined
CV 709.61	Total and permanent disability

CV 709.63 **Supplemental action**

CV 709.65 **Bad faith - refusal to pay or delay in paying insurance claim** *[Rev. 12/6/08]*

CROSS-REFERENCE: Contracts, see OJI-CV Chapter 501.

CV 709.01 Proof of loss or waiver

The burden is upon the plaintiff, in order to entitle her to recover here, first, to establish by a preponderance of the evidence that this property destroyed by fire was not excepted by any of the provisions of this policy of insurance upon which she predicates her action, and to establish the amount of her loss by reason thereof, and that within the time provided by the policy she furnished to the company, or its authorized agent proofs of loss, as required by the policy, or that that provision of the policy was waived by the company or its authorized agent; or by the act of its authorized agent she was prevented from thus complying with the conditions of the policy.

It is admitted in the pleadings and in the trial that the proofs of loss were not furnished within the time specified in the policy. The plaintiff seeks to avoid the effect of failing to comply with this condition of the policy by showing that it was waived by the company, or by its agent, or that the defendant company, or its agent, prevented her by their conduct from thus furnishing proofs of loss.

1. WAIVER. If you should find from the testimony that the agent, S., had authority to represent the company in the transaction of its business as an insurance company, the procuring of insurance, the filling out and issuing of policies, making contracts of insurance, and the collection and handling of its moneys, he had power to represent the company in waiving the provisions of the contract thus made by him. The burden of establishing this authority of this agent is upon the plaintiff, and if you should find he was thus authorized, then you will look into the testimony and determine whether or not he did waive the performance of this provision of this contract within the fifteen days. If he did not do it by express terms, did he by his act and conduct lead the plaintiff to understand, by what he said and what he did, that a strict compliance with that provision of this policy was waived and would not be insisted upon? Or did the adjuster, having authority to adjust and settle these losses, lead her by his conduct and declarations to understand that a strict performance of that provision of the policy would not be required?

COMMENT

United Firemen's Ins. Co. v. Kukral (1893), 7 Ohio C.C. 356, 4 Ohio C.D. 633, affirmed 51 Ohio St. 609. (From Kinkead, Instructions to Juries.)

CV 709.03 Time of proof of loss

1. These conditions are binding upon the plaintiff, and it cannot recover unless it has

shown that it performed them, or has shown waiver of such performance on their part

(Text continued on page 771)

(Rcl.09S1CIV–5/2009 Pub.4346)

by the defendant. The notice and proof of loss must be furnished for sixty days, before the insured is entitled to payment or has a right to bring a suit for the same. If the insured brings suit within the sixty days, he must fail, except in the event of the company denying all liability on the policy.

2. The requirement of preliminary proofs of loss is a formal condition inserted in the policy solely for the benefit of the insurer. That such proofs may be waived, in whole or in part, is well settled as a legal proposition. The waiver may be by the direct action of the insurer, or by his general agent by virtue of his authority. The waiver may be express, or it may be inferred from the denial of obligation by the insurer exclusively for other reasons.

A waiver may be inferred from the acts and declarations of the company, or of its authorized agents acting within the scope of their employment. The adjuster, employed by the defendant to act for it in the matter, was the agent of the company, and all he did in the matter within the scope and line of his employment and duties as such adjuster were the acts of the company and binding upon it.

Mere silence on the part of the company will not amount to a waiver of proof of loss; nor would the sending of agents to make inquiry or investigation into the matter of the loss; nor would even an attempt to compromise the matter, either or all of them, in themselves amount to a waiver of proofs of loss, provided nothing was done while so engaged that would cause a man of ordinary judgment and discretion to believe that formal proofs of loss were waived. But if such agent or agents, while so engaged, act in the matter so as to cause the insured to believe that proofs of loss are waived, and their acts are such as would have caused a man of ordinary discretion and judgment to so believe, and the insured, by reason thereof, refrains from making such proof, such acts will amount to a waiver of such proof. If the company, by its adjuster or agent, proceeds to investigate the matter of the loss on its merits, and by what it does causes the insured to believe, and a man of ordinary judgment under the circumstances would have so believed, that it is only the amount of the loss that is in dispute, and nothing else, between the parties, that will amount to a waiver of proofs of loss. So, as said, an absolute refusal to pay on the merits of the claim or a denial of liability to pay in any event will amount to a waiver. The company must not by its acts, or by the acts of its agents acting within the line of their duties and authority as such agents, do anything that will throw the insured off his guard and cause him to believe that proofs of loss are not wanted by the company. If such acts are such as would cause a man of ordinary judgment and discretion to so believe in like circumstances, and the insured so believed and acted on such belief, the company will be held to have waived such proofs.

And if the company waived such proofs, it cannot afterwards recall or reclaim such waiver, and demand or insist upon such proofs. If once waived, the company cannot afterwards insist upon the performance of the condition requiring such proof.

COMMENT

Evans, J., in *Germania Fire Ins. Co. v. Dunn & Co.*, Supreme Court, judgments affirmed, charge approved. See also *Enterprise Ins. Co. v. Parisot* (1878), 35 Ohio St. 35. (From Kinkead, Instructions to Juries.)

3. If you find from all the evidence and circumstances surrounding this case that there were such acts and conduct on the part of the defendant, by its officer or officers or agent or agents, so authorized to so bind the company, that would cause a man of ordinary judgment and discretion to believe that the formal proofs of loss within the sixty days would not be required, and that the same had been waived, that plaintiff so believed and so acted upon such belief, the company knowing it was so leading and causing plaintiff to so believe, would amount to a waiver of such proofs by acts and conduct of the defendant company.

COMMENT

Ohio Farmers Ins. Co. v. Cochran (1922), 104 Ohio St. 427, 135 N.E. 537. (From Kinkead, Instructions to Juries.)

CV 709.05 Proofs, limited purpose

The burden of proof of the material allegations of the plaintiff's petition that are denied by the answer is upon the plaintiff; that is to say, it being admitted that the policy was issued, the date, the amount of insurance, the property covered, the occurrence of the fire, and that in payment of the loss or damage there made, it then devolves upon the plaintiff to establish by a preponderance of the evidence that notice of such fire was given by the insured immediately after the occurrence, and that, as soon thereafter as possible for the plaintiff to do so, the plaintiff furnished to the defendants proofs of loss as required by the policy you have in force.

The fact, if you find it to be the fact, that the proofs of loss were made by the plaintiff to defendant company, as provided by the terms of the policy, does not relieve the plaintiff in the action from the burden of proof by a preponderance of the evidence of the amount of the loss or damage sustained by the fire to the property insured. The proofs of loss, if you find that any were made, are simply evidence for the insured of compliance with the conditions of the policy requiring them, but not of the facts contained in the proofs of loss. Therefore it devolves upon the plaintiff to prove by a preponderance of evidence the amount of loss or damage by reason of the fire to the said property insured, which loss or damage the policy provides shall be based upon the actual cash value of the property at the time of such fire. If the plaintiff has by a preponderance of the evidence proven these facts, then the plaintiff will be entitled to recover in such sum as the jury shall find from the evidence to be the amount of such loss or damage caused by the fire, unless the jury find by a preponderance of the

evidence the existence of certain other facts, or any of them, as claimed and alleged by the defendant in his answer, and of which testimony has been offered tending to prove.

COMMENT

Melhorn, J., in *Carnahan v. Pennsylvania Fire Ins. Co.*, Hancock County Common Pleas Court. (From Kinkead, Instructions to Juries.)

If you find from the evidence that blank forms were provided by the company for plaintiff, and the same were filled out, sworn to before a notary public by plaintiff and others, and transmitted to H., state agent for the company, by mail, and the same were received by the company, and thereupon the company in reply thereto notified the plaintiff by the letter, "exhibit A," that her claim under accident policy No. . . . . , written by this company on the life of G. S., has been disallowed, you may treat the condition of the policy as a proof of death of the insured, as having been complied with on the part of the plaintiff, or that the defendant waived further proofs of death.

COMMENT

Voris, J., in *Worstler v. Travelers Ins. Co.*, Summit County Common Pleas Court. (From Kinkead, Instructions to Juries.)

CV 709.07 "Earliest practical moment"

"Earliest practical moment" does not mean instantly, but it does mean very soon. If the bank on November 30, knew of such acts of Spear as required notice to be given under the foregoing instructions, then notice in January would not be at the earliest practical moment. Whenever any discovery was made, which required notice, the representative of the bank should have acted promptly and quickly and reasonably under all the circumstances and it is for you to determine from all the evidence in the case just when the discovery was made, when notice was given, and whether or not notice was given at the earliest practical moment after the discovery.

COMMENT

Rankin v. United States Fid. & Guar. Co. (1912), 86 Ohio St. 267, 99 N.E. 314.

CV 709.09 Vacant and unoccupied

1. If the jury should find that the house and premises in question were occupied at the

date of the policy by a tenant, and the tenant had removed from the premises before the time of the fire, and the house ceased to be used by any one living therein, then the house was vacated and unoccupied within the meaning of the terms of the policy, although some of the goods or furniture remained in the house at the time of the fire, and although the time of the tenant had not expired.

COMMENT

Farmers Ins. Co. v. Wells (1885), 42 Ohio St. 519. (From Kinkead, Instructions to Juries.)

2. If you find, ladies and gentlemen of the jury, that these premises were in fact vacant and unoccupied, and Mrs. R., or anyone representing her, gave notice to the duly authorized agent of the defendant of that fact, and you find that the agent upon receiving that notice said "all right," or words to that effect, "that he would be over and see her," that would constitute a waiver of this provision of the policy forfeiting same by reason of a vacancy and unoccupancy of the premises.

CV 709.11 Arson

1. Evidence has been offered in this case touching upon the value of the property insured, and it is maintained by the defendant that the evidence shows that all the property, including the land upon which the buildings were situated, were not of the value for which this property was insured; on the other hand the plaintiff maintains that the property was of greater value. This evidence was offered and bears upon the motives of the plaintiff, whether or not it would be to his interest to have this property destroyed and thus reap a benefit by the insurance, and therefore it is admitted for the purpose of showing what, if any, motives the plaintiff could have had for destroying this property, and whether it would be to the interest of this plaintiff so to do.

COMMENT

Gillmer, J., in *Hickox v. Ins. Co.*, Trumbull County Common Pleas Court.

2. In view of the large amount of testimony offered, consisting of papers, documents and oral evidence, and in view, also, of the amount involved, and the serious character of the charge, you should carefully scrutinize, examine and weigh each and every item of evidence, together with all the circumstances proved on the trial, and give to it such weight as in your judgment seems right; and if you believe, from a preponderance of the evidence, that the plaintiff, by one of its members, W. R. C., willfully caused or procured the property insured to be set on fire, then the plaintiff cannot recover, and your verdict should be for the defendant.

COMMENT

Pennsylvania Fire Ins. Co. v. Carnahan (1899), 19 Ohio C.C. 97, 10 Ohio C.D. 225.

CV 709.13 Loss from fire or explosion

It is not contended that any fire followed the explosion, and that any portion of this stock in trade was injured by a subsequent fire, but it is claimed by the plaintiff that there existed a precedent fire, and that the explosion was an incident of that precedent fire. The court has granted an instruction to the effect that if there existed upon the premises a fire, and that the explosion, if there was an explosion, followed as an incident to that fire, then the loss to the plaintiff would be really occasioned by the fire, for the explosion would be nothing but an incident to the fire.

Now, the question for you to determine in light of all this testimony and your own knowledge and experience is this: Was the falling of this building and injury to the stock in trade contained within it due to an explosion or not? If it was, and there was no antecedent fire, the verdict should be for the defendant. If you find in the case evidence that there was an antecedent fire, which did not amount to an explosion, but which was simply rapid combustion, which resulted in a collapse of the building and not in an explosion, then it is conceded that the plaintiff is entitled to recover such damages as you shall find that he sustained. If you find a verdict for the plaintiff, you ought to give him interest on the amount to which he is entitled from . . . . . , ... You may take the case, ladies and gentlemen.

If the jury believes from the evidence that on . . . . . , ... , the commodities of the plaintiff mentioned in the policy of insurance, offered in evidence, were destroyed or injured or lost in the manner testified to by the plaintiff's witnesses, and if they further find from the evidence that such loss of damage was the result of fire not having its origin or commencement by or with an explosion of any sort, but by the accidental combustion of any non-explosive substance in the cellar of plaintiff's premises, described in said policy, and that in consequence of such combustion the front building erected on said premises was prostrated, and the loss or damage to the property insured was the immediate result thereof, then the loss was occasioned by fire within the meaning of the policy, and the plaintiff is entitled to recover in this action.

COMMENT

Mitchell v. Potomac Ins. Co. (1901), 183 U.S. 42, 22 S.Ct. 22, 46 L.Ed. 74.

CV 709.15 Total loss

1. There can be no total loss so long as a remnant of the structure standing, the stone foundation being disregarded, is reasonably adapted for use as a basis upon which to

restore the building to substantially the condition in which it was before the injury by fire. And whether it is so adapted depends upon the question whether a reasonably prudent owner, uninsured, desiring such a structure as the one in question before the injury, would in proceeding to restore the building to substantially its original condition, utilize such remnant as a basis for such reconstruction.

2. A policy of insurance is upon the building as such and not upon the materials of which it is composed. If you find that the identity and specific character of the insured building was entirely destroyed by fire, then you must find for the plaintiff. A building loses its identity and specific character, when it has been so far destroyed by fire that it can no longer be called a building, and the portions that remain cannot be utilized to advantage in rebuilding it. That something might be realized out of portions that remain, for other purposes, is not material.

3. Although you may find that after the fire a large portion of the four walls were left standing, and that certain parts of the building were left untouched by the fire, still if you find that the building has lost its identity and specific character, you may find that the building was totally destroyed.

COMMENT

Pennsylvania Fire Ins. Co. v. Drackett (1900), 63 Ohio St. 41, 57 N.E. 962.

In the opinion, the court indicated that paragraph (a) was too liberal for the defendant company.

CV 709.17 False representation

As a ground of defense it is alleged by the defendant that the plaintiff, in order to obtain the insurance from the defendant company and other companies, to induce the defendant company to issue the policy sued on, and to take the risk equal to . . . . . part of the item described in the policy, falsely and fraudulently represented to the defendant that the plaintiff kept in his store building an average stock of merchandise to the value of $. . . . . To establish this defense claimed by the defendant the burden of proof is upon the defendant. It must show by a preponderance of the evidence that the plaintiff did make these representations alleged; that they were false, and that the plaintiff at the time they were made knew them to be false, that the defendant did not know that they were false, and that they were made to induce the defendant to issue the policy, and, if the defendant did so satisfy you, the plaintiff cannot recover and your verdict should be for the defendant. But if you find that the plaintiff did not make such representations, or, if made, that they were true and not false or fraudulent, then this defense fails. If you find from the evidence that the defendant concurred with his co-insurers on the property insured and fixed the value of the insurance as claimed by the plaintiff, the defendant cannot, under these circumstances and in the absence of any fraud on the plaintiff's part, complain

of the value so fixed on the said property in so far as claiming fraud on the plaintiff's part in this respect.

COMMENT

Fraud, see OJI-CV Chapter 449.

Melhorn, J., in *Carnahan v. Penn. Fire Ins. Co.*, Hancock County Common Pleas Court, affirmed (1899), 19 Ohio C.C. 97, 10 Ohio C.D. 225. (From Kinkead, Instructions to Juries.)

CV 709.19 Insurable interest

The defendant claims that the policy of insurance issued upon in this case was void and never took effect because the plaintiff at the time the policy was issued was not the owner of the property insured. You are instructed, therefore, that if the owner had no insurable interest in the property at the time the policy was issued, the policy would be void. But if you find from the evidence that he had an insurable interest in the property, the policy would not be void, unless you further find that the plaintiff, at the time he procured said policy, falsely and fraudulently represented his interest therein to the agent of the company. And if you find from the evidence that at the time the policy was issued the plaintiff had the legal title to the property and was in possession thereof, the mere fact that a man of some other name claimed an interest therein would not of itself vitiate the policy.

If you find that the plaintiff at the date of the policy was the absolute owner of the property, then he would have an insurable interest therein. And if the plaintiff at the date of the policy had a legal title to the property and was the owner thereof, but he was under obligations to account to some other persons for a portion of the proceeds thereof, he would still have an insurable interest therein.

But unless you find from the evidence that he falsely represented to the agent of the defendant company at the time of the issuing of the policy the true nature of his title and interest therein, the policy would not be void.

COMMENT

Nye, J., in *Leonard v. Queen Ins. Co.* (C.P. 1893), 11 Ohio Dec. Rep. 892. (From Kinkead, Instructions to Juries.)

CV 709.21 Insurance on steamboat

If she was in a seaworthy condition, and sufficiently manned for such a boat so lying up, and the loss was occasioned by the mere negligence and want of proper care of her watchman and those having the care of her, the plaintiff will be entitled to recover, if he has proven all other necessary facts, for such negligence is a peril insured against.

But if the negligence consisted in allowing the boat to become unseaworthy, and she was lost thereby, there can be no recovery.

The boat need not have been sufficiently seaworthy to perform a voyage, but it must have been for her preservation under all ordinary circumstances while tied up during such period of non-use, and if she encountered a peril insured against which she would have safely resisted if seaworthy, but in consequence of being unseaworthy was sunk by encountering a peril insured against, then the plaintiff can not recover.

And further, if the boat was seaworthy when laid up, but thereafter her seams were allowed to become open by exposure, which the plaintiff failed to have properly caulked, and she was not in a safe and seaworthy condition requisite for her safety when tied up, then the plaintiff cannot recover.

CV 709.23 Chimney fire

The court instructs that if you find by a preponderance of the evidence that combustible materials of any character in the chimney ignited, and an excessive fire was started, and the fire and heat, or either, in the chimney caused damage to the chimney, or to chimney, paper, walls and floor, that the same would be a risk under this policy of insurance, and defendant would be liable for the loss and damage, as hereinafter given you in this instruction. The court says to you that such a fire would be a fire not confined to the usual agencies for heating and building a fire, and would be one started without human agency, and where it was not intended to be started or maintained.

COMMENT

Washington Twp. Mut. Fire & Lightning Ins. Assn. v. Sherrer (1927), 32 Ohio App. 465, 168 N.E. 234, 27 Ohio Law Rep. 593.

CV 709.25 Burden on plaintiff to prove accidental injury

I charge you as a matter of law that the burden of proof is on the plaintiff, and that before he can recover, he must prove by a preponderance of the evidence that his injury was accidental. I further charge you as a matter of law that if the plaintiff intentionally followed a course of conduct which resulted in his own injury, such injury was not accidental, and your verdict should accordingly be for the defendant.

COMMENT

McLaughlin v. Massachusetts Indemn. Ins. Co. (1948), 85 Ohio App. 511, 40 O.O. 415, 84 N.E.2d 114.

CV 709.27 Accident or disease

If you find from the facts and circumstances proved that the coating of the stomach of

said George S. Dorney had been eaten through by an ulcer and was left in a weakened and diseased condition, and that but for such diseased and weakened condition of his stomach the injury which caused his death would not have resulted from anything he did on . . . . . , ... , then and in that case the plaintiff cannot recover and your verdict must be for the defendant.

COMMENT

Aetna Life Ins. Co. v. Dorney (1903), 68 Ohio St. 151, 67 N.E. 254.

CV 709.29 Death from accident or disease

The claim of the defendant is that the decedent, M. L. O., at and before the time of her death was suffering from a chronic lesion and disease of the heart; that this disease had existed for a long time before her death and that the exact period whereof is unknown to the defendant, but the averment is made that it was and had been chronic and that by reason of said chronic disease of the heart, plaintiff died at the time alleged and because of her death from that cause and from no other cause, the liability of the defendant, if any, to the executor of the deceased is limited to the amount of $300, and no more.

It is admitted that the defendant did issue a certain policy of insurance to Mrs. O. It is admitted that she died. It is admitted that proofs of her death were given the defendant. It is admitted that, up to a certain time, at least, the payment of premiums was made. In order to enable the plaintiff to recover in this case against the defendant, the plaintiff must prove that her death occurred in some manner against which the defendant insured her, and the burden of proof is upon the plaintiff so to show. This contract of insurance between these parties was a contract the terms of which were binding upon both parties thereto. If there has been proof that Mrs. O. died because of any causes against which she was insured under this policy, and that has been proven by a preponderance of the evidence, then the plaintiff is entitled to recover such amount of money as under the policy the company obligated itself to pay.

COMMENT

Ritchie, J., in *Newbegin v. National Cas. Co.*, Lucas County Common Pleas Court.

CV 709.31 Accidental means

1. What is meant by "accidental means" and how is this term, which is one of the conditions of the policy, different from the single word, "accident" or "accidental"? Well, to start with, accident is a broad and comprehensive word. When you combine accident with the means, the definition is restricted. Use of the word "means"

introduces the necessity for an accidental cause as distinguished from an accidental result. In other words, it is not enough that the result was unforeseen or unexpected. It is necessary that the means-the instrument or event-was accidental in origin or, as we say in law, that the cause itself was accidental. Accidental means is an expression which requires that the element of accident must exist in the cause, in the instrument or event which produced the death. In other words, to come within the definition of "accidental means" it must be shown by a preponderance of the evidence that the means, whether an instrument or an event, by which death was produced, was accidental. It must be established that the means which caused death was unexpected, unforeseen or accidental. It is not sufficient that the result—death itself—was unexpected, unforeseen or accidental.

The policy does not insure against accidental death. The policy provides for payment only upon death by accidental means. (*Mitchell v. New York Life Ins. Co.*, 136 Ohio St. 551, 17 O.O. 229, 27 N.E.2d 243.)

2. (a) The plaintiff must show by a preponderance of the evidence that the death of E. R. was due to and effected through external, violent and accidental means, which, independently of all other causes, caused the death of said E. R., and so caused the death * * * solely from such injuries within ninety days. Unless the plaintiff has shown by a preponderance of the evidence in this case that the death of E. R., the decedent, was the direct, proximate result of external, violent and accidental means, there can be no recovery.

COMMENT

Rheinheimer v. Aetna Life Ins. Co. (1907), 77 Ohio St. 360, 83 N.E. 491.

(b) If the defendant has proven by a preponderance of the evidence that the decedent's death was caused * * * as the direct result of a bodily injury effected solely by external and violent means, and not wholly inconsistent with accidental means, there is a rebuttable presumption that such death was caused * * * by accidental means. Such presumption that the means of causing death was accidental exists unless and until there is adduced substantial evidence that the means of death was non-accidental.

COMMENT

Shepherd v. Midland Mut. Life Ins. Co. (1949), 152 Ohio St. 6, 39 O.O. 352, 87 N.E.2d 156.

CV 709.33 Burden; death by accidental means

1. The court says to you as a matter of law that if the course of conduct voluntarily

entered upon by J. H. resulted in his death, and that death was reasonably foreseeable from that course of conduct, that his death did not result by accidental means within the terms of the policy, and your verdict must be for the defendant.

The policy in question is not intended to cover all accidents. It does not cover accidental death alone. There must be accidental means shown by the plaintiff which produced the death of J. H.

If J. H. voluntarily and intentionally employed the means which produced his death, then there can be no recovery under this policy.

A means is not accidental within the terms of the policy sued upon which provides for indemnity if death results independently of all other causes from bodily injury effected through external, violent and accidental means because some unexpected result followed in addition to that which was intended to be accomplished.

COMMENT

Hassay v. Metropolitan Life Ins. Co. (1942), 140 Ohio St. 266, 23 O.O. 465, 43 N.E.2d 229. Under an ordinary life insurance policy, containing exceptions to liability, proof of death alone imposes upon the insurer the burden of sustaining the pleaded exceptions (*Schultz v. Insurance Co.*, 40 Ohio St. 217), but in an action upon the increased indemnity provision of a life insurance policy the burden of showing death by accidental means rests upon the plaintiff. *Hrybar v. Metropolitan Life Ins. Co.* (1942), 140 Ohio St. 437, 24 O.O. 437, 45 N.E.2d 114.

2. EXTERNAL, VIOLENT AND ACCIDENTAL MEANS.

COMMENT

Lamneck, Judge J. H., Tuscarawas Common Pleas Court in *Shepherd v. Midland Mut. Life Ins. Co.* (1949), 152 Ohio St. 6, 39 O.O. 352, 87 N.E.2d 156.

Ladies and gentlemen of the jury, there has been a request made that the court give you certain instructions as to the law, before argument. The court will proceed to do that at this time:

I charge you, members of the jury, that the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that D. S.'s death resulted directly from bodily injury exclusively and independently of all other causes and that such bodily injury was effected solely through external violent and accidental means. If you find that the plaintiff has failed to prove these items by a preponderance of the evidence, then your verdict must be for the defendant.

Second, I charge you that the policies in question do not cover accidental deaths alone. They cover only those cases where death results from bodily injury effected solely

through external, violent and accidental means. Under these policies, it is not sufficient that D. S.'s death was accidental; it must have resulted from bodily injury and that injury must have been caused by accidental means. A means is not accidental within the meaning of these policies merely because some unexpected result followed in addition to that which was intended to be accomplished. If D. S. voluntarily followed an intended course of conduct which unexpectedly resulted in his injury and death, the result may be accidental but not the means, and there can then be no recovery under these policies. I therefore charge you that, if you find that nothing occurred which D. S. had not planned or anticipated, except his injury followed by his death, your verdict must be for the defendant.

3. I charge you that if you find from the preponderance of the evidence that James Carson met his death by external and violent means, under circumstances not wholly inconsistent with accident, the law raises a presumption of accidental death, which presumption may be rebutted upon the production of evidence to the contrary, which counterbalances it or leaves the case in equipoise.

The course instructs the jury that the burden is upon the plaintiff to prove by a preponderance, or the greater weight of the evidence, that the death of the insured occurred as the result, directly and independently of all other causes, of accidental means, and that said death did not occur as the result of suicide or self-destruction, while sane or insane, and should you find that plaintiff has failed to sustain that burden by a preponderance of the evidence, then your verdict must be for the defendant company. The burden never shifts, and although the defendant alleges in its amended answer that the insured's death resulted from self-destruction there is no burden upon it to prove that fact; instead, the burden of proof remains with the plaintiff to establish by a preponderance of the evidence that death did not result from self-destruction.

COMMENT

Special requests to charge in *Carson v. Metropolitan Life Ins. Co.* (1951), 156 Ohio St. 104, 45 O.O. 103, 100 N.E.2d 197. The first paragraph has been modified to conform to the opinion of the Supreme Court.

CV 709.35 Voluntary exposure to unnecessary danger

1. It is not disputed that the policies set forth in the petition were duly issued and were in force at the date of the death of Mr. H. If, therefore, you find that he died by drowning at the time and place named in the petition, and that his death was accidental, and that the plaintiff was his wife, the plaintiff is entitled to recover the insurance, unless you should find that Mr. H. voluntarily exposed himself to unnecessary danger.

2. If the jury finds that Mr. H. was familiar with the ford at and before the date on which he lost his life and that he judged from the appearance of the slough and the landmarks thereabout, and from such information as he had, that there was no danger to his life in crossing, and, in the exercise of his judgment, in good faith, though

erroneous, undertook to cross and lost his life thereby, the plaintiff will be entitled to recover.

3. Even if the jury should find that Mr. H. had been warned by some person or persons that the ford was dangerous, he would not be bound by such warning, but was entitled to act upon the opinion of others and upon his own knowledge and experience of the ford, if you find that he had such knowledge and experience.

4. An accident means any event which takes place without the foresight or expectation of the person acted upon or affected by the event.

5. Voluntary exposure to unnecessary danger relates to dangers of a substantial character of which the assured at the time had knowledge, and to which he purposely and consciously exposed himself, intending at the time to assume all the risks.

COMMENT

United States Mut. Accident Assn. v. Hubbell (1897), 56 Ohio St. 516, 47 N.E. 544. (From Kinkead, Instructions to Juries.)

CV 709.37 Exempted risk

The defendant in this case relies upon the proviso in the policy exempting it from liability in the event of an accident due to an "unnecessary or negligent exposure to obvious dangers." As to this defense, the burden is upon the defendant to prove by a preponderance of the evidence that the insured unnecessarily and voluntarily exposed himself to a known danger resulting in his death. "Unnecessary or negligent exposure to obvious dangers" does not include voluntary exposure to an unnecessary danger. It is for you to determine from the evidence in this case whether the accident to G. was due to an "unnecessary or negligent exposure to an obvious danger." If you so find by a preponderance of the evidence your verdict should be for the defendant.

COMMENT

North American Accident Ins. Co. v. Gulick (1903), 1 Ohio C.C.(N.S.) 477, 15 Ohio C.D. 395. (From Kinkead, Instructions to Juries.)

CV 709.39 Intoxicating liquor

The policy of automobile liability insurance upon which the plaintiff insured brings this action contains a special condition called an "intoxication exclusion endorsement" which provides that "in consideration of the premium charged it is understood that coverage under this policy is void if there is any evidence of drinking on the part of the insured at the time of an accident."

The condition in this endorsement voids the policy and excludes coverage if there is

any evidence of drinking of an intoxicating beverage. This means that some such beverage must have been consumed by the plaintiff, the amount being immaterial; and it also means that the effect of the drinking of the intoxicating liquor by the plaintiff must have been of such a nature as to impair his ability to operate a motor vehicle and result in his default in some act or failure to act in operating the car which act or omission proximately contributed in any degree to cause the accident.

COMMENT

Intoxication, see OJI-CV 411.25.

You will therefore confine your deliberations to these two issues: 1. Did the plaintiff consume any intoxicating beverage at or shortly before the time of the accident? 2. If you find from a preponderance of the evidence that he did consume some quantity of an intoxicating beverage, did such drinking proximately contribute in any degree to cause the accident?

COMMENT

Washington Fid. Natl. Ins. Co. v. Herbert (1934), 49 Ohio App. 151, 2 O.O. 278, 195 N.E. 492.

CV 709.41 "Theft" defined

The term "theft" as used in the policy comprehends the wilful taking or appropriation of plaintiff's automobile by another person wrongfully, without justification and with the design to hold or make use of the vehicle in violation of the rights of the plaintiff as the owner thereof.

COMMENT

Toms v. Hartford Fire Ins. Co. (1945), 146 Ohio St. 39, 31 O.O. 538, 63 N.E.2d 909.

CV 709.43 Beneficiary intended

As the court has previously instructed you, each of the parties here in this controversy before you, claim the proceeds of this insurance as the beneficiary of the policy on the life of Willie G. Giles.

The term "beneficiary" is defined as "the one to whom the insurance is payable." The beneficiary is the one who is entitled to the proceeds of the insurance policy.

There is no evidence in this case, nor is there any indication on the policy, Exhibit No. 1, that the beneficiary was ever changed. So the beneficiary designated on the policy

as of the effective date of the policy, October 10, 1944, is the beneficiary who under the law is entitled to the proceeds of the insurance policy. The question of fact for you to decide is, which of the two claimants in this controversy is the beneficiary designated in the policy. In other words, you will determine the identity of the beneficiary designated on the policy as "Jessie Giles—wife," as of the date October 10, 1944. The interrogatories answered by the plaintiff and undisputed evidence in this case is that the plaintiff and Willie Giles lived together as man and wife from about 1940 until December, 1945, and that plaintiff claims a common law relationship as man and wife, continued until his death. The evidence is undisputed that William Giles and the defendant were man and wife, but had not lived together after 1936. It is for you to decide in this case which one of these claimants did Willie G. Giles intend to and which did he designate as the beneficiary of his insurance policy when he took it out in 1944? The court further instructs you that since there never was a change of beneficiary on the policy after it was issued in 1944 that no act or word or circumstance after that date, October 10, 1944, can change or alter or affect the intended beneficiary that Willie G. Giles designated in 1944 when the policy was issued. In other words, you determine the intent of Willie G. Giles as to who he intended to be the beneficiary as of the time he took out the policy.

Ladies and gentlemen of the jury, there has been in evidence in this case an abundance of testimony as to the acts, conversations and circumstances which occurred after October 10, 1944, when the policy was issued. The court instructs you that you are to consider this evidence of what took place after the policy was issued, only to the degree of how that evidence will assist you in the determination of who Willie G. Giles intended to designate as his beneficiary in October, 1944, when he took out the policy.

The court instructs you that after the policy was issued in 1944 and the beneficiary designated as "Jessie Giles—wife," that Willie Giles could not by any act, word or circumstance change the identity of his intended beneficiary as he designated in 1944.

COMMENT

Straub, J., in *Giles v. Giles*, Lucas County Common Pleas Court.

CV 709.45 Burden of proving unsound health upon defendant

If you find that the defendant company delivered the policy to the plaintiff knowing either directly or through its agents that at the time of the issuing of the policy and the acceptance of the premium that the insured was suffering from asthma, then your verdict should be for the plaintiff. If, however, you find that no notice was given to the company itself of the asthmatic condition and if you further find that the asthmatic condition was such a condition as to not represent sound health, your verdict will be for the defendant. The burden of proving that the insured was not in sound health is upon the defendant.

COMMENT

Sparks v. American Life & Acc. Ins. Co. (App. 1940), 31 Ohio Law Abs. 613.

CV 709.47 Sound health

If you find that on the date of the policy, or when it was delivered to the plaintiff, Mrs. S. H. was not in a state of sound health, you must find for the defendant.

Sound health as used with reference to life insurance, means that state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, and not a mere indisposition which does not tend to weaken or undermine the constitution of the assured. The word "serious" is not generally used to signify a dangerous condition, but rather a grave or a weighty trouble.

Whatever the policy states also in such terms and conditions as you will find printed either upon the face or back of the policy, when persons accept a policy they accept its terms and conditions. They are held to know what the policy that they received from the insurance company contains; so that, when you come to examine this policy, which you will have in your jury room, the question may be considered concluded by you as to the acceptance of this policy with its terms and conditions.

COMMENT

Metropolitan Life Ins. Co. v. Howle (1900), 62 Ohio St. 204, 56 N.E. 908.

CV 709.49 Presumption of sanity

I say to you, as a matter of law, that there is a presumption that no human being will destroy himself, and that you will indulge this presumption unless the evidence before you, by a preponderance, shall indicate the contrary.

I further say to you that there is a presumption in law that every person will exercise due care for his own safety, and that you shall indulge this presumption unless the evidence before you, by a preponderance, shall indicate the contrary.

The certificate of membership of the said J. D. W. in the defendant order, and which is the basis of this suit, provides, among other things, that "This order shall not be liable to any person for any benefits for any death, disability, or loss resulting from * * * self-destruction" (while sane or insane) and I therefore say to you that if you find from all the facts and circumstances in this case that the death of said J. D. W. was from self-destruction when he was sane or insane, then plaintiff cannot recover, and your verdict should be for the defendant.

In this case the defendant will have the benefit of the presumption of sanity, because the law presumes that a man is sane until the contrary is shown by evidence sufficient to overcome the presumption.

COMMENT

Order of United Commercial Travelers v. Watkins (1931), 38 Ohio App. 420, 176 N.E. 469.

CV 709.51 Burden upon defendant to clearly prove false answer material

The burden rests upon the defendant in this case to clearly prove that the answer in the insured's application for the policy that the insured had never consulted a physician with reference to any ailment was willfully false, was fraudulently made, that it was material, and induced the defendant to issue the policy, and that but for such answer the policy would not have been issued; and, also that neither the defendant nor its agent had knowledge of the falsity or fraud of such answer.

COMMENT

R.C. 3911.06. *Penn Mut. Life Ins. Co. v. McGraw* (1926), 21 Ohio App. 308, 153 N.E. 131; *Kessler v. Metropolitan Life Ins. Co.* (1938), 61 Ohio App. 240, 15 O.O. 170, 22 N.E.2d 508.

CV 709.53 Good health

a. A misrepresentation or false statement made by an applicant for an insurance policy, whether made in the application or in the policy when it is delivered to the applicant, or in or during the course of the medical examination pursuant to said application for insurance, cannot operate to avoid a contract of insurance or to render it of no force and effect, unless the said misrepresentation or false statement was made by the applicant, at the time, with intent to deceive, or unless such misrepresentation or false statement increased the risk of loss to the insurance company. The fact, if it be a fact, that the deceased, M. L., had been attended by or had consulted a physician for a disease within five years before the date of the application for the policy sued on, would not, of itself, be sufficient to avoid the contract of insurance, unless the jury believes, by a preponderance of the evidence, that said M. L., at the time she made the statement that she had not consulted or been attended by a physician within the past five years for any disease, knowingly made the statement with the intent to deceive the defendant, or else that the fact, if it be a fact, that she had been so attended by or consulted a physician, increased the risk of loss to the company. When the decedent, M. L., made application to the defendant for a policy of insurance, it was her duty to exercise good faith in answering the questions propounded in the application and not to practice any evasion or suppression of facts which would enable the officers of the defendant to determine whether she was an acceptable risk. The defendant has no right to complain of answers and base a refusal thereon to pay the claim, unless the preponderance of evidence shows that there was an evasion or bad faith practiced by

the decedent and a purpose on her part to conceal some fact which she naturally, under the circumstances, would suppose were contemplated by the question, or questions, which misled the defendant and it thereby issued the policy which might not otherwise have been issued.

COMMENT

Krueger, J., in *Lis v. Metropolitan Life Ins. Co.*, Lucas County Common Pleas Court.

b. The expression "good health" does not mean that said applicant, H. L. K., be entirely and absolutely free from bodily infirmities, or of tendency to disease. If he was in reasonably good state of health and free from any disease or illness that tended seriously or materially to weaken or undermine his general bodily strength and constitution he would have been in "good health."

In other words, any slight ailment such as occurs occasionally for a day or so which does not seriously or materially affect one's health, should not be considered by you as showing that said H. L. K. was not in good health at the time he made his application to the defendant for insurance.

Furthermore, if you find from the evidence adduced in this case that said H. L. K. was not in good health at the time of his application, yet, if he did not know that his health was not good and had no reason to know, and made his answer in his application that he was in good health, honestly, and fairly supposing himself to be so, the fact that he may not have been in good health at the time he made his application, would not avoid the fault and prevent a recovery in this action.

On the other hand, if said H. L. K. was not in good health in the sense in which I have stated it to you, then it comes within the meaning of the phrase good health. If he answered that he was, when in fact he was not, and should have known that he was not in good health, that would avoid the policy.

COMMENT

Conn, J., in *Kessler v. Metropolitan Life Ins. Co.*, Wood County Common Pleas Court, reversed upon other grounds (1938), 61 Ohio App. 240, 15 O.O. 170, 22 N.E.2d 508.

CV 709.55 Fraud of insurance agent

COMMENT

Jenkins, Judge David G., Mahoning County Common Pleas Court in *Pannunzio v. Monumental Life Ins. Co.* (1958), 168 Ohio St. 95, 5 O.O.2d 356,

151 N.E.2d 545, in which the opinion states the instructions were "substantially" correct.

The issue of fact here is on the question of what information was given to the agent of the defendant company previous to the making up of the application for a policy, which is here in evidence, and on the basis of which the policy was issued. In substance, the claim of the plaintiff is that the agent of the defendant, with full authority to bind this company, was informed of the disease or physical condition, from which later she died, and was informed of attendance on her and treatment of her by Dr. F., but that the agent having that information himself falsely and fraudulently filled out the application signed in blank by the decedent to exactly the contrary. That is, in substance, the claim of the plaintiff, which is denied by the defendant, and that is the issue of fact for you to determine, namely, how and by whom and with what knowledge were the answers in that application put there.

This is a contract, this insurance policy, and the defendant is a corporation, and it, necessarily, only acts through agents, and this is the law with respect to agents of insurance companies: A soliciting agent, procuring for an insurance company risks and applications on which policies are issued, who fills up the application, is, in so doing, the agent of the company, and not of the insured; and if such agent wrongfully and purposely misstates facts in such application, the answers to which had been correctly given him by the insured, or an agent of the insured, in preparing the application, the company is bound by and responsible for such action of its agent. And if it is established here by the greater weight of the evidence that the plaintiff's claim is substantiated, then the agent in that case having bound by what then would be false statements knowingly made, would have bound the company to such an extent that any provisions in the policy, by virtue of which it could have voided the policy, are, in the eyes of the law, waived. The reason for that is that one cannot, by its own fraud and fraud of its agent, claim the advantages otherwise in the contract. So that it all gets back to the question of whether these fraudulent, and knowingly fraudulent, and false statements in the application were knowingly made by the agent of the defendant company; that is the question in the case, and if that is demonstrated, as the plaintiff claims to you, by the greater weight of the probabilities, the plaintiff is entitled to recover.

COMMENT

Fraud, see OJI-CV Chapter 449.

CV 709.57 Total disability—loss of arm

I charge you that you must take it as common knowledge that a man with only one arm and not otherwise incapacitated may do much valuable work and engage in many gainful occupations; and the plaintiff in this case will not be entitled to your verdict

simply because of the loss of his forearm as alleged. He must go further and prove by a preponderance of the evidence that the loss of his forearm has incapacitated him totally and permanently from engaging in any occupation or performing any work for compensation of financial value.

COMMENT

Mosher v. Equitable Life Assur. Soc. (1936), 57 Ohio App. 435, 11 O.O. 121, 14 N.E.2d 413.

CV 709.59 Total disability defined

By total disability we mean this: that he was completely unfitted and unable to perform the work that he had been pursuing up to the time that he became disabled, should you find by a greater weight of the evidence that he did so become disabled.

And with reference to the meaning of the words "permanent disability," you are to consider not the whole span of his life, past and future, but what you find by the greater weight of the evidence to be the fact as to his total inability to work in the period covered by this lawsuit.

COMMENT

Gibbons v. Metropolitan Life Ins. Co. (1939), 135 Ohio St. 481, 14 O.O. 387, 21 N.E.2d 588.

CV 709.61 Total and permanent disability

a. Before the plaintiff is entitled to recover in this case, he must prove by a preponderance of the evidence that he "has become totally and permanently disabled so as to be unable at any time to perform any work or engage in business for compensation or profit." This does not mean that such disability must necessarily continue for the remainder of the plaintiff's life, but it does mean that it shall, with reasonable probability, continue for some indefinite period of time without any present indication of recovery therefrom. The test of plaintiff's ability to perform any labor for compensation is not limited strictly to the occupation or vocation in which the plaintiff may have followed at the time his disability accrued, but extends to any comparable employment for which the plaintiff is fitted by education, experience and physical condition.

COMMENT

Stuhlbarg v. Metropolitan Life Ins. Co. (1944), 143 Ohio St. 390, 28 O.O. 343, 55 N.E.2d 640.

b. Now, therefore, before the plaintiff is entitled to recover he must prove by what we call in law the preponderance of the evidence that on October 2, 1940, he had become totally and permanently disabled so as to be unable at any time to perform any work or engage in any business for compensation or profit and that such permanent and total disability continued through April 2, 1941, and for any period included in the petition which you may find him to have been so permanently disabled and totally and permanently disabled.

COMMENT

Woeste, J., Hamilton County Common Pleas Court in *Stuhlbarg v. Metropolitan Life Ins. Co.* (1944), affirmed 143 Ohio St. 390, 28 O.O. 343, 55 N.E.2d 640.

As stated before, you are called upon to decide whether or not L. S. was, from October 2, 1940, to April 2, 1941, and for a subsequent period alleged in the petition, totally and permanently disabled so as to be unable at any time to perform any work or to engage in any business for compensation or profit. Now, the obvious purpose of this claim or this rider as we have termed it during the trial of the case, which provides for the waiver of the premium and the payment of total disability benefits, is to guarantee to the insured in case he becomes disabled the continuance of his life policy and some income to relieve his minor needs. You are instructed, members of the jury, that the law does not exact the literal interpretation of the language used in the policy in order to entitle the plaintiff to the benefits under this clause. An insurance policy must be given the effect that its general purposes indicated. In other words, the law engrafts an interpretation for your purposes upon such a clause in an insurance policy so that the literal interpretation need not be given it by you, but rather you are to so interpret it as to carry out its general and evident and clear purpose.

It is incumbent upon the court, therefore, to inform you as to the law as it may apply to this clause. For your purposes, therefore, you are instructed that total disability within the meaning of this policy and for your purposes is that degree of disability whereby the plaintiff was rendered completely unfit and unable to perform the work that he had been pursuing up to the time he became disabled, should you find by a preponderance of the evidence that he did so become disabled.

With reference to the words "permanently disabled" or "permanent disability," you are instructed that you are to consider not necessarily the whole span of life, past and future, but you are to consider what you find by a preponderance of the evidence to be the duration of his total disability to work, if any you so find, in the period following April 2, 1941.

Now, consider this, if you should find that the plaintiff was gainfully employed on a salary for any period claimed in the petition and after April 2, 1941, which salary

provided him with a competence for himself and family then the plaintiff cannot be said to have been, or to be permanently and totally disabled within the terms of the policy. If you should find for a like period, or any period, that the plaintiff was employed by his brothers so as to provide him with occupation for the purpose of improving his health or effecting a cure of his condition, if you find he had a health condition of any kind, or a mental disability, and that money was paid him as a gratuity or a gift then such employment could not be considered by you as performing any work or engaging in any business for compensation or profit within the purview of the policy.

Now, members of the jury, if after a fair and careful consideration of all the evidence you conclude that the plaintiff has failed to prove by a preponderance of the evidence that he did suffer total and permanent disability as described in the policy then, of course, the plaintiff in this case cannot recover. On the other hand, should you find that he did so prove by a preponderance of the evidence then he should recover.

COMMENT

Later on request of the defendant, the court said: Now, Mr. Marble requests that I tell you what the word "competence" is. I stated to you at one time in connection with Mr. S. earning money now sufficient to be a competence for himself and family, I would say that was such a reasonable sum by way of income which would provide him with the rudiments of sustenance, the rudiments of sustenance for a person in his station in life. You understand that? Anything further?

CV 709.63 Supplemental action

COMMENT

Leonard v. Murdock (1946), 147 Ohio St. 103, 33 O.O. 269, 68 N.E.2d 86.

Ladies and gentlemen, it is now my duty to define to you the issues of fact which you have to determine from the evidence I have permitted to go to you, and to give you the rules of law applicable to the questions that you have determined.

This is an unusual proceeding, in the sense that it is not the ordinary lawsuit; it is a supplemental proceeding provided by statute in certain cases, and in order that you may understand the nature of this proceeding, I will read you the statute which provides for its application, which is R.C. 3929.06.

In brief and ordinary English, then, the question here is whether the defendant against whom a judgment in this case has been rendered was insured under the policy of insurance here; that is the issue raised, because if he was, then this is a proceeding to apply the proceeds of an insurance policy to the payment of a judgment recovered

against the defendant who was insured under the policy.

Now, I want to, at the outset, dismiss from your minds any consideration of the question of the negligence of M. resulting in personal injuries to the plaintiff, or the extent of the injuries or the nature of the negligence of M. or the amount of the recovery. All those things have been judicially determined in the case and the judgment has been rendered thereon and you aren't interested in any phase of that part of the case. Your issue of fact here is, did the insurance policy in evidence in this case, cover, protect or indemnify M. as the insured thereunder at the time and place and under the circumstances set forth in the original petition, against loss of damage sustained by any person, due to the negligence of the said M.

I will now call your especial attention to what I am about to read from this endorsement:

"Whenever the word 'insured' appears in this endorsement, it shall be held to mean the motor transportation company, or private motor carrier, named in the policy, its agents and employes, and also held to mean any independent contractor of said motor transportation company or private motor carrier, engaged in transporting persons or property, or providing or furnishing such transportation service."

Was M. engaged at the time, October 17, 1941, the time of this accident, in doing something which naturally grew out of or was incident to the performance of the business of providing or furnishing transportation service for the cartage company under his arrangement with it and which did not arise wholly from some external, independent and personal motive on the part of M. to do the act upon his own volition?

Was M., in driving his vehicle on the road at the time and place the accident occurred, for which the judgment herein was recovered, doing something fairly, necessarily and naturally incident to the providing or furnishing of transportation service for The G. Cartage Company, in the course and scope of his arrangement or agreement with The G. Cartage Company?

If, by the greater weight of the evidence, your answer to this last question is yes, your verdict should be for the plaintiff. If your answer to this question is not yes, by the greater weight of the evidence bearing upon it, then your verdict should be for the defendant.

COMMENT

Agency, see OJI-CV Chapter 423.

CV 709.65 Bad faith - refusal to pay or delay in paying insurance claim *[Rev. 12/6/08]*

1. GENERAL. The plaintiff claims that (*insert name of defendant*) breached its duty to act in good faith in the processing of the plaintiff's insurance claim. Before you can find for the plaintiff, you must find by the greater weight of the evidence that (*insert*

name of defendant) lacked good faith in the (processing) (payment) (satisfaction) (settlement) of the plaintiff's insurance claim.

COMMENT

Drawn from *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461; *Jay v. Massachusetts Cas. Ins. Co.*, 5th Dist. Nos. 2006CA00201, 2006CA00229, and 2007CA00243, 2008-Ohio-846.

2. LACKED GOOD FAITH. A "lack of good faith" is the equivalent of bad faith. Bad faith does not require that the insurer act with bad intent or malice. The (refusal) (delay) of the defendant(s) to (process) (pay) (satisfy) (settle) an insurance claim is not, by itself, bad faith. "Bad faith" means that the defendant(s) failed to act with reasonable justification in refusing or delaying the (processing) (payment) (satisfaction) (settlement) of the plaintiff's claim.

COMMENT

Drawn from *Farmers Ins. of Columbus, Inc. v. Lister*, 5th Dist. No. 2005-CA-29, 2006-Ohio-142. See, also, *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461.

3. REASONABLE JUSTIFICATION. An insurance company (refuses) (delays) the (processing) (payment) (satisfaction) (settlement) of an insurance claim without a reasonable justification when there is (no lawful basis) (a failure to determine whether there was any lawful basis) for the (refusal) (delay). "No lawful basis" means that the insurance company lacked a reasonable basis in law or fact for refusing to (pay the claim) (process the claim without excessive delay). (Where a claim is in dispute, the insurance company is entitled to refuse the claim as long as the refusal is based on a genuine dispute over either the status of the law at the time of the denial of the claim or the facts upon which the claim is based.)

COMMENT

Drawn from *Farmers Ins. of Columbus, Inc. v. Lister*, 5th Dist. No. 2005-CA-29, 2006-Ohio-142; *Barker v. Am. Std. Ins.*, 6th Dist. No. WD-03-093, 2004-Ohio-4144. See, also, *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461.

Drawn from *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621; *Farmers Ins. of Columbus, Inc. v. Lister*, 5th Dist. No. 2005-CA-29, 2006-Ohio-142.

The Committee believes that whether there is a genuine dispute as to the

status of the law is usually determined by the court and not the jury.

4. MALICE. OJI-CV 315.37 § 2.

5. ADEQUATE INVESTIGATION (ADDITIONAL). An insurance company has a duty to conduct an adequate investigation into an insurance claim. (The failure to conduct an adequate investigation) (Delaying the completion of that investigation for an excessive time) can be evidence of the defendant's bad faith.

COMMENT

Drawn from *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461; *Barker v. Am. Std. Ins.*, 6th Dist. No. WD-03-093, 2004-Ohio-4144. This instruction should be given only if the plaintiff presents evidence that the defendant failed to conduct an adequate or reasonably timely investigation.

6. BURDEN OF PROOF. OJI-CV 303.03.

7. PREPONDERANCE. OJI-CV 303.05.

8. PROXIMATE CAUSE. OJI-CV 405.01.

9. AFFIRMATIVE DEFENSE:

(A) GENERAL. OJI-CV 303.03 § 4.

(B) CONCEALMENT OR MISREPRESENTATION BY THE PLAINTIFF. The defendant claims that the plaintiff knowingly or willfully (concealed from) (misrepresented) a (material) (significant) (important) fact or circumstance relating to the defendant's investigation of the plaintiff's insurance claim. If you find that the defendant has proved by the greater weight of the evidence that the plaintiff (concealed a material fact) (made such a misrepresentation), then you must return a verdict for the defendant.

COMMENT

Drawn from *Farmers Ins. of Columbus, Inc. v. Lister*, 5th Dist. No. 2005-CA-29, 2006-Ohio-142. This instruction should be given only if the insurance company asserts concealment or misrepresentation by the insured.

(C) KNOWINGLY. OJI-CV 447.01 § 2(G).

(D) WILLFULLY. "Willful" means an act is intentional and (premeditated) (malicious) (done with evil intent) (done with a bad motive or purpose).

COMMENT

Drawn from *Drawl v. Cornicelli* (1997), 124 Ohio App.3d 562.

(E) MISREPRESENTATION. "Misrepresentation" means an untrue statement of fact concerning a (material) (significant) (important) matter made by an insured to his/her/its insurance company with the knowledge that it is untrue and with intent to deceive the insurance company.

COMMENT

Drawn from *Farmers Ins. of Columbus, Inc. v. Lister*, 5th Dist. No. 2005-CA-29, 2006-Ohio-142.

10. CONCLUSION FOR DEFENDANT. If the plaintiff failed to prove by the greater weight of the evidence that the defendant breached its duty to act in good faith in the (processing) (payment) (satisfaction) (settlement) of the plaintiff's insurance claim or failed to prove that the failure of the defendant was a proximate cause of any injury claimed by the plaintiff then you shall enter a verdict for the defendant.

11. CONCLUSION FOR PLAINTIFF. If you find by the greater weight of the evidence that the defendant breached its duty to act in good faith in the (processing) (payment) (satisfaction) (settlement) of the plaintiff's insurance claim and that such failure was a proximate cause of any injuries suffered by the plaintiff, then you must continue your deliberations and consider whether the defendant proved by the greater weight of the evidence the affirmative defense that the plaintiff (concealed) (misrepresented) a (material) (significant) (important) fact or circumstance.

(A) DEFENDANT PROVED AFFIRMATIVE DEFENSE. If you find the defendant proved the affirmative defense, you shall enter a verdict for the defendant.

(B) DEFENDANT FAILED TO PROVE AFFIRMATIVE DEFENSE. If you find the defendant failed to prove the affirmative defense by the greater weight of the evidence and you find the plaintiff proved his/her/its claim by the greater weight of the evidence, you shall then consider the issue of damages.

12. COMPENSATORY DAMAGES. OJI-CV Chapter 315.

13. PUNITIVE DAMAGES. OJI-CV 315.37.

(Text continued on page 795)

Chapter CV 713

CIVIL RIGHTS

CV 713.01 Deprivation of rights—42 U.S.C. § 1983

COMMENT

Section 1983 authorizes a court to grant relief to individuals whose federally protected rights are violated by state or local officials. The Supreme Court best described the type of case that might arise under this section:

"A catalog of . . . Constitutional claims that have been alleged under § 1983 would encompass numerous and diverse topics and subtopics: discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of schoolchildren, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without any advance notice or sufficient opportunity to be heard—to identify only a few." *Wilson v Garcia* (1985), 471 U.S. 261, 273, 105 S.Ct. 1938, 1946, 85 L.Ed.2d 254, 264–265.

These instructions are designed to address the most common claims litigated under 42 U.S.C. § 1983. Note that the defense of qualified immunity is governed by federal law and determined by the court prior to trial. *Roe v. Hamilton Cty. Dept. of Human Serv.* (1988), 53 Ohio App.3d 120, 560 N.E.2d 238.

1. INTRODUCTION. Plaintiff claims that (*describe person acting under state or local law and/or local government entity*) deprived him/her of (*describe right, privilege or immunity*).

2. STATUTORY REQUIREMENTS. Any person in the United States has the right to recover damages when any other person who, under color of any state law or custom, deprives him/her of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States.

3. ELEMENTS OF A SECTION 1983 CLAIM.

COMMENT

The elements of a section 1983 claim are listed in *1946 St. Clair Corp. v.*

Cleveland (1990), 49 Ohio St.3d 33, 550 N.E.2d 456. There is no state of mind requirement within § 1983 itself. The constitutional or statutory right that is being enforced through § 1983 may require proof of a state of mind. For example, see OJI-CV 713.01 § 4(A) (right to medical care).

The plaintiff must prove by the greater weight of the evidence:

(A) the defendant is the government or a person who has acted under color of or under the authority of some state or local law;

(B) the defendant acted to deprive, interfere with, or take away from the plaintiff rights, privileges or immunities secured by the Constitution or laws of the United States, and

(C) the defendant's acts were the proximate cause of any injuries claimed by the plaintiff.

4. DEPRIVATION OF RIGHTS, PRIVILEGES AND IMMUNITIES.

COMMENT

The following instructions (A-D) cover some of the most frequently litigated deprivations under § 1983.

(A) RIGHT TO MEDICAL CARE (PRISONER)

COMMENT

The Eighth Amendment applies to convicted persons. *Estelle v. Gamble* (1976), 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251; *Leach v. Shelby Cty. Sheriff* (C.A.6, 1989), 891 F.2d 1241. The Fourteenth Amendment applies to pretrial detainees but the result is a standard identical to the standard for convicted persons. *Molton v. Cleveland* (C.A.6, 1988), 839 F.2d 240.

The right to medical care for mentally retarded persons involuntarily committed to a state hospital is protected by the Fourteenth Amendment to the United States Constitution but is a different standard separately described in *Youngberg v. Romeo* (1982), 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28.

The United States Constitution prohibits the deprivation of medical care to a person held in custody (by the defendant). In order to establish liability on this claim the plaintiff must show that the defendant was deliberately indifferent to a serious medical need of the plaintiff.

A "serious medical need" includes mental as well as physical problems. A serious medical need left untreated or improperly treated is one that would result in

significant physical or mental injury to the prisoner including but not limited to the loss of life.

"Deliberate indifference" means intentionally depriving a prisoner of adequate medical care or recklessly ignoring known serious medical needs.

(B) FREEDOM FROM EXCESSIVE FORCE

COMMENT

Claims of excessive force made by convicted persons against prison guards should be judged under the Eighth Amendment. *Whitley v. Albers* (1986), 475 U.S. 312, 106 S.Ct. 1078, 89 L.Ed.2d 251. Serious or permanent injury is not a prerequisite to an Eighth Amendment claim. *McHenry v. Chadwick* (C.A.6, 1990), 896 F.2d 184. Claims of excessive force in an arrest should be judged under the Fourth Amendment. *Graham v. Connor* (1989), 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443.

(1) Arrested person

Plaintiff claims that he/she was subjected to excessive force by the defendant in making his/her arrest. A person, even if he is being lawfully arrested, has a right to be free from unreasonable or excessive force. An officer is entitled to use such force as a reasonable officer on the scene would think is required to subdue a person. An officer should not use force beyond that necessary to accomplish his lawful purpose.

Whether a particular use of force is reasonable is not based upon the subjective motive of an officer. Rather, it must be judged objectively, from the perspective of a reasonable officer on the scene. That decision should be based upon the facts and circumstances of each case, including the severity of the crime at issue, whether the plaintiff posed an immediate threat to the safety of the officer or others, and whether the plaintiff was actively resisting arrest or attempting to escape.

(2) Convicted person

The plaintiff claims that he was subjected to cruel and unusual punishment while (incarcerated) (in jail). The Eighth Amendment to the United States Constitution protects convicted prisoners from cruel and unusual punishments. To meet this standard, the plaintiff must show by the greater weight of the evidence much more than ordinary lack of due care. Unnecessary and wanton infliction of pain constitutes cruel and unusual punishment. "Wanton" means that the defendant intended to harm the prisoner or showed such recklessness in the face of a known danger to the prisoner that an intent to harm may be inferred. Consider the following factors when deciding whether force was applied in good faith or for the purpose of causing unnecessary harm:

(a) the need for the application of force;

(b) the relationship between the need and amount of force used and the extent of injury inflicted;

(c) the extent of the threat to the safety of staff and inmates as reasonably perceived by the officials on the scene on the basis of facts known to them; and

(d) any efforts made to limit the amount of force.

(C) DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS (EMPLOYMENT)

(1) Defining the property right

COMMENT

In many cases the question of whether the plaintiff has a protected "property interest" is one of law and not one to be made by the jury. The following instruction may be used on those occasions when the existence of a property interest depends entirely on the determination of contested issues of fact. See *McLaurin v. Fischer* (C.A.6, 1985), 768 F.2d 98, 102.

See generally, *1946 St. Clair Corp. v. Cleveland* (1990), 49 Ohio St.3d 33, 550 N.E.2d 456, and *Cooperman v. University Surgical Assoc., Inc.* (1987), 32 Ohio St.3d 191, 199, 513 N.E.2d 288; *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 428, 71 L.Ed.2d 265, 102 S.Ct. 1148.

Absent a finding of a property right in continued employment, a "name clearing hearing" may be required if the employer creates and disseminates a "false and defamatory impression about the employee in connection with his termination so as to infringe on his right to liberty." *State, ex rel. Kilburn, v. Guard* (1983), 5 Ohio St.3d 21, 23 448 N.E.2d 1153.

Under the United States Constitution, no state may deprive a person of property without due process of law. In order to decide whether a plaintiff has been denied due process of law, you must consider two questions. First, you must decide whether the plaintiff had a protected "property interest" in his/her particular job. If you find that he/she did, you must then decide whether he/she received due process of law in being removed from that job.

Thus, a plaintiff must first establish by the greater weight of the evidence that he/she had a protected "property interest" in continued employment in that job. A "property interest" is protected when the person has a legitimate claim or right to his/her job. The plaintiff must demonstrate more than his/her own expectation of continued employment in that job. Rather, he/she must establish by the greater weight of the evidence that mutual understandings between himself/herself and his/her employer or the employer's established practice in the work place support his/her claim or right to continued employment in the job.

(2) Procedural due process requirements

COMMENT

A simple pre-termination hearing (not a full evidentiary hearing) is required for a classified civil servant. *Cleveland Bd. of Ed. v. Loudermill* (1985), 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487; *Fairley v. State Personnel Bd. of Review* (1986), 29 Ohio App.3d 113 504 N.E.2d 75. See also, *Mathews v. Eldridge* (1976), 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893.

(If you decide) (You are instructed) that the plaintiff has a protected property interest in his/her job, (and) you must then decide whether the defendant deprived him/her of that interest without procedural due process when the defendant removed him/her from his job. Procedural due process is a flexible concept designed to limit governmental decisions which deprive individuals of property. A plaintiff has received procedural due process if he/she has received reasonable notice of the charges against him/her, an opportunity to be heard at a meaningful time and an opportunity to be heard in a meaningful manner. The plaintiff in this case claims that he/she did not receive (*describe appropriate element*). To recover, the plaintiff must prove by the greater weight of the evidence that the defendant denied him/her (*describe appropriate element*).

(D) FIRST AMENDMENT (EMPLOYMENT)

COMMENT

Whether the speech as alleged by the plaintiff is protected by the First Amendment is a question of law for the court. *Rankin v. McPherson* (1987), 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315; *Connick v. Myers* (1983), 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708. For "same decision" test where there are mixed reasons for the discharge see *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle* (1977), 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471.

See also, *Rutan v. Republican Party of Illinois* (1990), 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (patronage).

The plaintiff alleges that he/she was improperly discharged for engaging in speech protected by the First Amendment to the United States Constitution. Speech about (*describe speech*) is protected by the First Amendment. The plaintiff must prove by the greater weight of the evidence that his/her speech was a substantial or motivating factor in the employer's decision to discharge the plaintiff.

The defendant may have discharged the plaintiff for more than one reason. If the protected speech was one of those reasons, the plaintiff must prove by the greater

weight of the evidence that it played a substantial or motivating part in the actual decision to discharge the plaintiff.

(*Use the following if appropriate*)

Even if you decide that the speech was a substantial or motivating factor in the termination of plaintiff, you must still find in favor of the defendant if the defendant has shown, by the greater weight of the evidence, that the plaintiff would have been discharged from employment even in the absence of plaintiff's protected speech. It is not enough to show that other reasons were present. The defendant must prove by the greater weight of the evidence that he/she would have discharged the plaintiff based on those other reasons even in the absence of plaintiff's protected speech.

5. COLOR OF STATE LAW.

COMMENT

In most cases, action is clearly under color of law. Parts of this instruction should be given as needed in those situations where the plaintiff contends that otherwise private conduct is chargeable to the state. See *West v. Atkins* (1988), 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40; *Lugar v. Edmondson Oil Co., Inc.* (1982), 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482; *Adickes v. S.H. Kress & Co.* (1970), 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142; *Stengel v. Belcher* (C.A.6, 1975), 522 F.2d 438.

An additional way that a private person could be held to act "under color of state law" is by conspiring with government officials. *Tower v. Glover* (1984), 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758.

A person acts under color of or under the authority of the state if he is a government official; or if he acts together with or obtains significant aid from government officials; or if his conduct amounts to conduct by the government. The term "state" includes both state and local governments.

(*Use the following if appropriate*)

Acts may be done under color of or under the authority of the state, not only when persons act within the limits of their lawful authority, but also when such persons act beyond or misuse power possessed by virtue of state law.

(*Use the following if appropriate*)

In deciding whether the conduct "amounts to conduct by the government," you should consider whether the conduct is private or personal action bearing no relation to a governmental purpose, or whether it is government action.

6. DEPRIVATION BY GOVERNMENTAL UNIT.

COMMENT

Respondeat superior does not apply in § 1983 actions. See generally, *Jett v.*

Dallas Independent School District (1989), 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598; *St. Louis v. Praprotnik* (1988), 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107; *Pembaur v. Cincinnati* (1986), 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452; *Monell v. Department of Social Services of the City of New York* (1978), 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611.

The Supreme Court has held that, "Reviewing the relevant legal materials, including state and local positive law, as well (sic) 'custom or usage' having the force of law, (citation omitted), the *trial judge* must identify those officials or governmental bodies who speak with final policy-making authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the *jury* to determine whether their decisions have caused the deprivation of rights at issue by policies that affirmatively command that it occur (citation omitted), or by acquiescence in a longstanding practice or custom which constitutes 'standard operating procedure' of the local governmental entity" (citation omitted). *Jett v. Dallas Independent School District* (1989), 491 U.S. 701, 109 S.Ct. 2702, 2723, 105 L.Ed.2d 598 (emphasis added).

Additional text is included in these instructions for cases where liability is premised on a single act or on a failure to train. *Canton v. Harris* (1989), 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (failure to train).

(*Describe local government unit*) is a defendant in this case and is liable if its acts or omissions caused a violation of the plaintiff's rights, privileges or immunities. The (*describe governmental unit*) is not liable for an act or failure to act simply because it is the employer. It is liable, however, for the actions and omissions of its policy-making officials if they establish policies or acquiesce in a custom or practice that deprives the plaintiff of rights, privileges or immunities.

The policy, custom or practice need not be officially adopted. It can be set by those whose acts or omissions may fairly be said to represent official policy. In this case the policy-making official(s) (is) (are) (*describe person* [*s*]).

You must decide whether the plaintiff has proven by the greater weight of the evidence that the policy, custom or practice at issue was the moving force behind the violation of his rights, privileges or immunities.

(*Use the following if the plaintiff alleges a deprivation by a single act*)

There need not be an ongoing pattern of events to establish liability against the (*describe governmental unit*). If a single act is taken pursuant to general policy or if a deliberate choice to follow a course of action was made from among various alternatives by the official(s) responsible for setting final policy on that issue, the (*describe governmental unit*) is liable for that act.

(*Use the following if the plaintiff alleges a deprivation due to failure to train*)

Plaintiff claims that (*describe governmental unit*) is liable because it failed to train

(*describe government employees*). An inadequate training policy may only serve as the basis for government liability where the failure to train amounts to a deliberate indifference to the constitutional rights of persons with whom the (*describe government employees*) come into contact and is a cause of the ultimate injury. If you find that the need for more or different training to carry out the duties assigned to (*describe governmental employees*) is obvious and the inadequacy of or the lack of training provided to those employees is likely to result in a violation of constitutional rights, then you may conclude that the (*describe governmental unit*) has been deliberately indifferent.

COMMENT

Drawn from *Canton v. Harris*, *supra*.

7. SUPERVISORY LIABILITY.

COMMENT

Rizzo v. Goode (1976), 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561; *Leach v. Shelby Cty. Sheriff* (C.A.6, 1989), 891 F.2d 1241, 1246; *Poe v. Haydon* (C.A.6, 1988), 853 F.2d 418; *Bellamy v. Bradley* (C.A.6, 1984), 729 F.2d 416, certiorari denied (1984), 469 U.S. 845; *Hays v. Jefferson Co.* (C.A.6, 1982), 668 F.2d 869.

A supervisory official may be liable for a violation of the plaintiff's rights, privileges and immunities. He/she is not liable simply because of the supervisory relationship. He/she is liable if he/she is personally involved in the deprivation of rights. "Personal involvement" means that the deprivation took place at the supervisor's direction, or with the supervisor's knowledge, acquiescence or consent. "Personal involvement" may also mean that the supervisor set in motion a series of acts by his/her subordinates which he/she knew or reasonably should have known would cause a deprivation of rights. A supervisor is also liable, even though he/she was not personally involved, if he/she grossly disregards his/her duty to oversee the subordinate and if a reasonable person in the supervisor's position would have known that his/her disregard of duty would cause a deprivation of rights.

8. BURDEN OF PROOF. OJI-CV 303.03

9. PREPONDERANCE. OJI-CV 303.05

10. PROXIMATE CAUSE. OJI-CV 405.01

11. CONCLUSION. If you find by the greater weight of the evidence that the defendant acting under color of or under the authority of state law, deprived plaintiff of rights, privileges or immunities, and that such conduct was a proximate cause of any

injuries suffered by the plaintiff, then you must continue your deliberations and consider the issue of damages.

On the other hand, if the plaintiff failed to prove by the greater weight of the evidence that the defendant acted under color of state law or that the defendant deprived the plaintiff of rights, privileges or immunities, or that the defendant's acts were a proximate cause of any injury claimed by the plaintiff, you must find for the defendant and you will not consider damages.

12. DAMAGES. OJI-CV Chapter 315, Damages (Compensatory, punitive and nominal)

COMMENT

Compensatory damages may not be based on the abstract "value" or "importance" of a constitutional right. *Memphis Community School Dist. v. Stachura* (1986), 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249. The Supreme Court has held that the basic purpose of § 1983 damages is to "compensate persons for injuries caused by the deprivation of constitutional rights." *Carey v. Piphus* (1978), 435 U.S. 247, 254, 98 S.Ct. 1042, 55 L.Ed.2d 252. Thus, instructions on damages under section 1983 should not differ from those in tort actions. An instruction on nominal damages is appropriate where the plaintiff has proved a violation of a right but failed to prove the amount of injury. See *Carey v. Piphus, supra* (procedural due process) and *Memphis Community School Dist. v. Stachura, supra*, at 311 (discussing voting rights).

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